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**THE**  
**AMERICAN DECISIONS**

**CONTAINING THE**

**CASES OF GENERAL VALUE AND AUTHORITY**

**DECIDED IN**

**THE COURTS OF THE SEVERAL STATES**

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO  
THE YEAR 1869.**

**COMPILED AND ANNOTATED**

**BY A. C. FREEMAN,**

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISES ON THE LAW OF JUDGMENTS,"  
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

**VOL. LXXXI.**

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# AMERICAN DECISIONS.

VOL. LXXXI.

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**AMERICAN DECISIONS.**  
**VOL LXXXI**



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ALABAMA.**

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**LAWSON v. HICKS.**

[88 ALABAMA, 279.]

**LIBEL AND SLANDER.**—WORDS SPOKEN OR WRITTEN BY COURT, the parties or counsel, in the due course of judicial proceedings, if relevant, are not actionable, but are absolutely privileged communications, and although irrelevant, do not constitute a cause of action unless they are in fact malicious. In such case, proof of actual malice is upon complainant.

**IN ACTION OF SLANDER OR LIBEL,** malice is usually inferred by law from the defamatory matter itself; and when so inferred, is denominated legal malice, in contradistinction to malice in fact. Where this legal inference of malice is drawn, the absence of express malice is no justification, although it is to be considered in mitigation of damages.

**LIBEL AND SLANDER.** — **INFERENCE OF MALICE** is not drawn as matter of law when words are written or spoken by parties or counsel in the due course of judicial proceedings, although they may be irrelevant; and the plaintiff is compelled to base his recovery upon malice in fact. The question of malice is purely an inquiry for the jury.

**LIBEL AND SLANDER.** — **WORDS SPOKEN OR WRITTEN** in the course of judicial proceedings, though irrelevant, are not actionable, unless it affirmatively appears that they were malicious and uttered without reasonable or probable cause to believe them relevant. This question of reasonable or probable cause of belief is for the jury in determining the question of malice.

**IN ACTION OF LIBEL OR SLANDER,** averment of want of “justifiable cause or excuse” to believe the defamatory matter relevant is not equivalent to the averment of “want of reasonable or probable cause,” required by the Alabama statute.

**WHERE SPECIAL PLEA IS DEFENSE TO ACTION,** and the defense set forth is available under the general issue, the judgment will not be reversed for error in sustaining a demurrer to the plea.

**MERE READING OF CROSS-INTERROGATORIES** and answers in evidence at the trial is not proof, as matter of law, in a subsequent action between the same parties, that they were relevant.

**IN ACTION OF LIBEL, CROSS-INTERROGATORIES** signed by defendant in his handwriting, and found in the clerk's office, are evidence so conducing to show publication as to admit them in evidence, and leave the question of publication to the jury.

**FOR PURPOSE OF IMPEACHMENT**, witness will not be allowed to state in general terms that he had been intimately acquainted with the party for a number of years, and had never heard him utter a declaration proved by another witness.

**ACTION** to recover damages for defamatory words written and published in filing cross-interrogatories to a witness whose deposition was taken in an action of trespass between the parties to this suit. The opinion sufficiently states the facts.

*Chilton and Rice*, for the appellant.

*Gunn and Strange*, contra.

By Court, A. J. WALKER, C. J. Words calumnious in their nature may be deprived of their actionable quality by the occasion of their utterance or publication. When this is the case, they are called in the law of defamation privileged communications. These communications are either absolutely or conditionally privileged. When they are absolutely privileged, the law affords conclusive and indisputable immunity from suit. When they are conditionally privileged, the law simply withdraws the legal inference of malice, and gives a protection upon the condition that actual malice, or express malice, or malice in fact (as the same idea is variously phrased), is not shown. The distinction between the two classes is, that the protection of the former class is not at all dependent upon their *bona fides*; while the latter is merely freed from the legal imputation of malice, and becomes actionable only by virtue of the existence of express malice: Cooke on Defamation, 28, 31, 60; Starkie on Slander, 229, 292. This latter class comprehends all those cases "where the author of the alleged mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his own private interest, or even that of another, called upon him to perform": Starkie on Slander, 292; Cooke on Defamation, 31; *Toogood v. Spyring*, 1 Crompt. M. & R. 181; *Easly v. Moss*, 9 Ala. 266; *Stallings v. Newman*, 26 Id. 300 [62 Am. Dec. 723].

To the catalogue of absolutely privileged communications belong all words spoken or written by the court, the parties, or the counsel, in the due course of judicial proceedings, which may be relevant. The relevancy, or pertinency, of the calum-

nious matter is indispensable to its perfect and absolute freedom from all actionable quality; and being relevant, it can give rise to no civil responsibility, no matter how great the malignity or malice from which it may have originated. Some obscure expressions may be found in the English reports, from which ingenuity might extort an argument that communications in the course of judicial proceedings were absolutely privileged, so far as a subsequent action might be concerned, without regard to their pertinency. As an example of such expressions, we may instance the following remark of Lord Mansfield: "There can be no scandal if the allegation is material; and if it is not, the court before whom the indignity is committed, by immaterial scandal, may order satisfaction, and expunge it out of the record, if it be upon record": *Astley v. Younge*, 2 Burr. 807. See also the remarks of Chancellor Walworth upon several cases in *Hastings v. Lusk*, 22 Wend. 410 [34 Am. Dec. 330]. We apprehend that the remark quoted, if defensible at all in its full extent, was intended merely to suggest a large authority in the court before which the scandal was committed, and not to deny that irrelevant words, uttered with actual malice, might become the basis of a subsequent action.

The law designs, in the adoption of the principle above stated, to relieve those participating in the proceedings of courts of justice from the restraint which might result from the apprehension of lawsuits. The accomplishment of that object does not require that the privilege of absolute exemption should be extended further than to relevant communications. A further extension would license malignity to pervert judicial proceedings, to the accomplishment of its wicked purposes. The avoidance of such a consequence is scarcely less important than the guarding of the unembarrassed freedom of judicial investigation. Accordingly, we find numerous and conclusive authorities, which, in the clearest manner, put the qualification, that only those communications occurring in the course of judicial proceedings are absolutely privileged, which are relevant: *Brook v. Montague*, 2 Cro. Jac. 90; *Hodgson v. Scarlett*, 1 Barn. & Ald. 232; *Flint v. Pike*, 4 Barn. & Cress. 473, 481; *Mower v. Watson*, 11 Vt. 536 [34 Am. Dec. 704]; *Suydam v. Moffat*, 1 Sandf. 459; *Warner v. Paine*, 2 Id. 195; *Lea v. White*, 4 Sneed, 111; *Ring v. Wheeler*, 7 Cow. 725; *Gilbert v. People*, 1 Denio, 41 [43 Am. Dec. 646]; *Garr v. Selden*, 4 N. Y. 91; *Fairman v. Ives*, 5 Barn. & Ald. 642.

If the communications be irrelevant, they do not necessarily become actionable. They must be malicious, as well as irrelevant. Because they were uttered in the course of judicial proceedings, the law does not draw the inference of malice from their injurious character, but requires from the complaining party proof of actual malice. The line which separates relevancy from irrelevancy to a legal controversy is often extremely shadowy and indistinct; and the position of the counsel or parties conducting a cause would be full of peril if the imputation of legal malice was incurred whenever, from ignorance of law or frailty of judgment, criminary remarks of an irrelevant character might be made. The communications of counsel and parties, made in the due course of a judicial proceeding, are therefore not only absolutely privileged when relevant, but cannot constitute a cause of action, although irrelevant, unless they are in fact malicious.

Malice is usually inferred by law from the defamatory matter itself; and when so inferred, it is denominated legal malice, in contradistinction to malice in fact. Where this legal inference of malice is drawn, the absence of express malice is no justification, although it is to be considered in mitigation: Cooke on Defamation, 28; Starkie on Slander, 213, 216, 456, marg. p. 217, 218; *Shelton v. Simmons*, 12 Ala. 466; *Curtis v. Mussey*, 6 Gray, 272. The inference of malice is not drawn as a matter of law when the words are spoken or written by parties or counsel in the due course of judicial proceedings, although they may be irrelevant; and the plaintiff is compelled to base his recovery upon the existence of malice in fact. The question of malice becomes purely an inquiry for the jury; and they may consider the character and quality of the words in determining the question of malice. The intrinsic effect of the words would argue to the jury the existence of express malice, with a force which would be increased by the obviousness of their irrelevancy, and the grossness of the calumny, and might be lessened or destroyed by the ignorance of the defendant, or other pertinent circumstances. The entire question of malice is an inquiry of fact, to be determined by the jury, upon all the evidence pertinent in the light of their reason; and they must give to the intrinsic force of the words themselves such weight upon the point at issue as it may seem to them to merit, when considered in connection with the other evidence.

For the purpose of supporting and illustrating our views, as to the principles which must govern when irrelevant expres-



sions are used in the course of judicial proceedings, we proceed to note the positions of some legal authorities upon the subject. The words "relevancy or pertinency," in this class of cases, seem to be sometimes used by English authors indiscriminately with the phrase "probable or reasonable cause"; and Cooke, in his most excellent work on defamation, page 60, says: "The pertinency of the matter to the occasion is, it is submitted, that which is meant by probable cause." Starkie, in his work on slander, page 286, doubts whether a recovery can be had against an advocate for words spoken by him in a judicial controversy, and concludes that, at all events, such recovery can only be had in a special action, alleging express malice and the want of probable cause: See also Cooke on Defamation, 62; 1 Am. Lead. Cas. 185; *Fairman v. Ives*, 5 Barn. & Ald. 642; *Hodgson v. Scarlett*, 1 Id. 232. Holroyd, J., announcing his opinion in the case of *Flint v. Pike*, 4 Id. 481, says: "And if a counsel, in the course of a cause, utter observations injurious to individuals, and not relevant to the matter in issue, it seems to me that he would not therefore be responsible to the party injured, in a common action for slander, but that it would be necessary to sue him in a special action on the case; in which it must be alleged in the declaration, and proved at the trial, that the matter was spoken maliciously, and without reasonable cause." The learned judge furthermore assimilates such an action to a suit for malicious prosecution, in which it is necessary to aver want of probable cause and malice: *Long v. Rodgers*, 19 Ala. 321; *Ewing v. Sanford*, Id. 605.

In the case of *Mower v. Watson*, 11 Vt. 536 [34 Am. Dec. 704], the court thus sums its conclusions on this subject from an elaborate examination of the authorities: "If any one considers himself aggrieved, in order to sustain an action of slander, he must first show that the words spoken were not pertinent to the matter then in progress, and that they were spoken maliciously and with a view to defame him." There are several decisions in the New York reports to the same effect. Contenting ourselves with referring to the rest, we extract from *Suydam v. Moffat*, 1 Sandf. 459, the following statement of the law in reference to irrelevant matter published in a judicial proceeding: "Though the words in the declaration were not published on an occasion which forms an effectual shield to the defendant, whatever his motives may have been in using them; yet, in cases of this kind, the law does not im-

pute malice to a party from the mere fact of his having published the words. The jury must be satisfied that there was actual malice on the part of the defendant, and that they were published for the mere purpose of defaming the plaintiff": *Warner v. Paine*, 2 Id. 195; *Garr v. Selden*, 4 N. Y. 91; *Ring v. Wheeler*, 7 Cow. 725; *Gilbert v. People*, 1 Denio, 41 [43 Am. Dec. 646]; *Hastings v. Lusk*, 22 Wend. 410 [34 Am. Dec. 330]; also *Lea v. White*, 4 Sneed, 111.

We think it is also a correct proposition in law, that a party or his representative is not amenable to an action, where, although the matter stated was impertinent, he believed that it was relevant, and had reasonable or probable cause so to believe. Cooke, in his work on defamation, page 62, to which we have heretofore referred, says: "It seems that the parties, or their representatives, are entitled to state anything which, although not strictly relevant, may be fairly supposed by them to weigh with the court." In the case of *Lea v. White*, 4 Sneed, 111, the matter alleged to be libelous consisted of a return to a writ of *habeas corpus*; and the court thus states the question upon which the case turned, and the decision of the question: "Could the defendant have reasonably supposed it necessary to his defense to return on the writ of *habeas corpus* the alleged libelous matter? We think that he might have reasonably supposed that the statement would have exerted an influence on the mind of the court; and this being so, he had a right to introduce it, and rely upon it in his defense." In *Hastings v. Lusk*, 22 Wend. 410 [34 Am. Dec. 330], and *Suydam v. Moffat*, 1 Sandf. 459, the position is distinctly taken that if the defendant honestly supposed the declarations to have been relevant to the proceeding, he is shielded from action. Chief Justice Tilghman expressed the same idea by saying that "if a man should abuse his privilege, and designedly wander from the point in question and maliciously heap slander upon his adversary, he would not say that he was not responsible in an action at law": *McMillan v. Birch*, 1 Binn. 178 [2 Am. Dec. 426]; *Ring v. Wheeler*, 7 Cow. 725.

Lest the generality of the expressions quoted should mislead, we close our observations upon this point by remarking that the defendant is not absolutely shielded by the single fact of his believing the matter to be relevant; but to entitle him to be thus shielded, there must be also reasonable or probable cause for so believing. In the absence of reasonable or probable cause, his belief of the relevancy would be a matter of fact

to be weighed by the jury in determining the question of malice. The grossness or obviousness of the irrelevancy is a matter to be weighed by the jury in determining the question of reasonable or probable cause, in like manner as in determining the question of malice. We deem it proper, further, to distinctly announce, as another result of our investigations, that words spoken in the course of judicial proceedings, although irrelevant, are not actionable, unless it affirmatively appears that they were malicious, and without reasonable or probable cause.

Guided by the principles which we have stated, we decide that the plaintiff's amended complaint would be good, and that the demurrer to it would be properly overruled, if it contained the averment of a want of reasonable or probable cause. It avers the want of "justifiable cause or excuse." This averment is not equivalent to that which the law requires.

The defendant's first special plea was also a valid defense to the action; but we would not reverse for the error of sustaining a demurrer to it, as the defense it sets forth was available under the general issue: *Hastings v. Lusk*, 22 Wend. 410 [34 Am. Dec. 330]; *Suydam v. Moffat*, 1 Sandf. 459; 1 Saunders's Pl. & Ev. 801; Starkie on Slander, 455; Cooke on Definitions, 107.

The defendant's second special plea was bad. It proceeds upon the erroneous supposition that the mere reading of cross-interrogatories and the answers to them in evidence is proof, in a subsequent cause between the same parties, that they were relevant. Whatever might be the effect of a decision that they were relevant, a legal conclusion of relevancy cannot be drawn from the mere fact of reading in evidence.

The third special plea was bad, as is apparent from a comparison of it with the principles hereinbefore laid down.

The fact that the cross-interrogatories, signed by the defendant, and in his handwriting, were found in the clerk's office, was evidence so conducing to show a publication that the court might with propriety admit them in evidence, and leave the question of publication to the jury.

The defendant having proved by a witness a declaration of the plaintiff, to rebut this evidence and to impeach the defendant's witness, the plaintiff was permitted to prove, by another witness, that he had been intimate with the plaintiff for fifteen years, and had never been told any such thing by him. In admitting this evidence, the court erred. It has been decided in this state that "when the situation of a witness is such

that if a fact had existed, he would probably have known it, his want of knowledge is some evidence, though slight, that it did not exist": *Blakey v. Blakey*, 33 Ala. 611. The reason of this principle does not sustain the ruling of the court below, in permitting a witness to state, in general terms, that he had not at any time heard the party utter a declaration proved by another witness. The general rule, to which the point presented is no exception, is, that a party cannot make evidence for himself, either by his conduct or declarations: *Chaney v. State*, 31 Id. 342; *Bradford v. Edwards*, 32 Id. 628.

As the judgment of the court below must be reversed for reasons already stated, and the principles we have laid down cover the real and important questions of the case, we decline to further swell this opinion.

Reversed and remanded.

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WORDS SPOKEN BY COUNSEL OR BY PARTY conducting his own case, in the course of judicial proceedings, if relevant and pertinent to the question before the court, are privileged, and not subject to an action for slander, however false, malicious, and injurious they may be: *Hastings v. Lusk*, 34 Am. Dec. 330, and note 340; *Mower v. Watson*, Id. 704; *Stallings v. Newman*, 62 Id. 723; *Barrows v. Bell*, 66 Id. 479, and note 486.

WORDS NOT RELEVANT OR PERTINENT to the matter in question spoken in the course of judicial proceedings are nevertheless privileged, if spoken in good faith, under a belief that they were relevant and proper, and without actual malice, of which the jury are to judge: *Hastings v. Lusk*, 34 Am. Dec. 330. In such case, actual malice must be proved: *Bradley v. Heath*, 22 Id. 418.

IN ACTIONS FOR LIBEL OR SLANDER, malice is often and generally implied: *Tresca v. Maddox*, 66 Am. Dec. 198, and note 202; *Jellison v. Goodwin*, 69 Id. 62, and note 65; *Holt v. Parsons*, 76 Id. 49, and note 52; *Hosley v. Brooks*, 71 Id. 252.

IN ACTION FOR SLANDER concerning privileged communications, question of malice is for the jury: *Barrows v. Bell*, 66 Am. Dec. 479, note 486; *Jellison v. Goodwin*, 69 Id. 62, and note 65.

JUDGMENT WILL NOT BE REVERSED for error not prejudicial to the complaining party: *Johnson v. Jennings*, 60 Am. Dec. 323; *Balliet v. Commonwealth*, 55 Id. 581; *Lucas v. New Bedford etc. R. R. Co.*, 66 Id. 406; *Williams v. Brickell*, 75 Id. 88, and notes to these cases; *Baker v. Haldeman*, 69 Id. 430.

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## FOSTER v. KENNEDY'S ADMINISTRATOR.

[33 ALABAMA, 359.]

MEASURE OF DAMAGES FOR FALSE REPRESENTATIONS concerning the boundary lines to land, as to the location of a certain mill-pond and mill, is the diminution of the value of the property in consequence of the mill and pond not being on the land on which it was represented to be. The inquiry is limited to the injury resulting from the false representations.

**IN ACTION TO RECOVER DAMAGES FOR FALSE REPRESENTATIONS** concerning the boundary lines to land, as to the location of a mill-pond and mill, a witness is not allowed to make comparisons between the actual value of the property and the value upon the supposition of the pond being upon one tract of land, when the false representations alleged in the complaint are that it is upon another tract.

**FRAUD, WHAT CONSTITUTES.** — Neither a knowledge of the falsity of a representation, nor the presence of circumstances manifesting a recklessness of truth, is an indispensable ingredient of fraud. Any representation by the vendor of land in regard to a material fact, which operated as an inducement to the purchase, upon which the vendee had a right to rely, and by which he was actually deceived and injured, is fraud.

**LAW DOES NOT PRONOUNCE, AS EXPRESSIONS OF OPINION,** representations made by a vendor as to the boundaries of land, or as to the qualities of machinery situate thereon. They may be either expressions of opinion or of fact, and it is for the jury to decide whether they are one or the other.

**ACTION to recover damages for false representations by a vendor of land.** The opinion sufficiently states the facts.

*Heflin and Forney*, for the appellant.

*J. Falkner*, contra.

By Court, A. J. WALKER, C. J. The evidence of Clifton tended to show that the defendant misrepresented the location of the lines of the land, and did so knowingly; and it requires no argument to prove that his evidence was admissible. But under the averments of the complaint, the evidence of the witness Berryhill was not admissible. The alleged misrepresentation was, that the mill-pond and mill were on the southwest quarter of the northwest quarter of section 5, township 20, range 10; and Berryhill was allowed to testify that if the entire pond had been included in the tract represented in the diagram, which was the east half (or the southeast and northeast quarters) of the southeast quarter of section 6, in the same township and range, the land would have been worth more by three hundred dollars. The measure of damages for the falsity of the alleged representation was the diminution of the value in consequence of the mill and pond not being on the land on which it was represented to be. The inquiry must be as to the injury resulting from the fact that the representation was false: *Gibson v. Marquis*, 29 Ala. 668; *Stow v. Bozeman*, Id. 397; *Ward v. Reynolds*, 32 Id. 384. A comparison is to be made between the actual value and the value upon the supposition of a correspondence with the representation. The comparison which the witness was permitted to make was

between the actual value and the value upon the supposition of the pond being upon one piece of land, when the representation alleged was that it was upon another tract. The testimony was, therefore, not admissible under the complaint, and the court erred in admitting it.

There was no error in the refusal of the charges asked by the defendant. Neither a knowledge of the falsity of a representation nor the presence of circumstances manifesting a recklessness of truth, is an indispensable ingredient of a fraud. "A misrepresentation by the vendor of land, in regard to a material fact, which operated as an inducement to the purchase, upon which the vendee had a right to rely, and by which he was actually deceived and injured, is a fraud": *Foster v. Gressett*, 29 Ala. 393; *Blackman v. Johnson*, 35 Id. 252; *Kelly v. Allen*, 34 Id. 663. The law does not pronounce representations as to the boundaries of land, or as to the qualities of machinery, to be expressions of opinion. They may be either statements of facts or statements of opinion; and it is for the jury to decide whether they are one or the other.

The declarations of the defendant made to John A. H. Kennedy, the husband of the plaintiff's intestate, before the purchase, will probably hereafter be offered in connection with other facts, not stated in the bill of exceptions to have attended their offer on the previous trial. We therefore do not deem it necessary to pass upon the admissibility of such evidence in this case. Besides, the question of admissibility may, perhaps, be changed by an amendment of the complaint.

Reversed and remanded.

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MEASURE OF DAMAGES for false representations on the part of the vendor: See *Campbell v. Hillman*, 61 Am. Dec. 195, and note 201; *Page v. Parker*, 60 Id. 172, and note 183.

WHAT FALSE REPRESENTATION WILL AMOUNT TO FRAUD: See *Mitchell v. Zimmerman*, 51 Am. Dec. 717; *Monroe v. Pritchett*, 50 Id. 203; *Juan v. Toulmin*, 44 Id. 448; *Campbell v. Hillman*, 61 Id. 195; *Alvarez v. Brannan*, 68 Id. 274; *Bunn, Raiguel, & Co. v. Ahl*, 72 Id. 639; *Gould v. York Co. etc. Ins. Co.*, 74 Id. 494, and notes to these cases. As to what misrepresentations on the part of a vendor will constitute fraud, see *Parham v. Randolph*, 35 Id. 403; *Monroe v. Pritchett*, 60 Id. 203; *Brown v. Manning*, 74 Id. 736, and notes to these cases.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ARKANSAS.**

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**WATKINS v. MARTIN.**

[24 ARKANSAS, 14.]

**PARTY CANNOT REVERSE JUDGMENT ON ERROR, when he has recovered judgment and received the amount of it from defendant.**

**THE** opinion contains the facts.

*Stillwell and Woodruff*, for the plaintiff.

*Williams and Martin*, for the defendant.

By Court, COMPTON, J. The plaintiff in error seeks to reverse a judgment which he recovered against the defendant in the court below, for \$1,140, residue of debt, with damages and costs; and the defendant pleads in bar that the plaintiff caused an execution to issue on the judgment, which was afterwards, and before the issuance of the writ of error, fully paid off and satisfied.

It is insisted on demurrer that the matters alleged in the plea are not sufficient to bar the writ. We think they are. Where a party has recovered a judgment, and received the amount of it from the defendant, he will not be permitted to reverse the judgment on error: *Laughlin v. Peebles*, 1 Penr. & W. 114. The counsel for the plaintiff has referred us to *Barthelemy v. People*, 2 Hill (N. Y.), 248; but there is nothing decided in that case which conflicts with the view taken in this. There, the judgment was against the parties seeking the reversal. They had been sentenced to confinement in the penitentiary, and it was insisted that the sentence of the



court was satisfied, because it appeared on the face of the record that the term of confinement had elapsed. To this objection the court said there were two answers: 1. They were not only sentenced to confinement, but each was also fined, and it was not apparent on the record that the fine of either had been paid; and 2. The payment or satisfaction of an erroneous judgment against a party could never be allowed as a bar to a writ of error, even in a case where no restitution could follow as a legal consequence, and the reason given by the court is, that such a judgment against the party "is an injury *per se*, from which the law will intend he is or will be damnified by its continuing against him unreversed." In the case before us, the judgment is not only satisfied, but it is also in favor of the party seeking the reversal.

The demurrer is overruled.

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RIGHT TO PROSECUTE WRIT OF ERROR TO REVERSE JUDGMENT was denied on the ground that the plaintiff in error had compelled and received satisfaction of the judgment, and had not offered to return the money so received, in *Cassell v. Fayin*, 47 Am. Dec. 151, and *Knox's Distributors v. State*, 54 Id. 181.

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## MARY v. STATE.

[24 ARKANSAS, 44.]

**ARSON IS MALICIOUS AND WILLFUL BURNING** of the house or outhouse of another.

**BURNING OF HOUSE NECESSARY TO CONSTITUTE ARSON** at common law must be an actual burning of the whole or some part of the house. Neither a bare intention nor an attempt to burn a house by actually setting fire to it will amount to arson, if no part of it is burned. But it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance. The Arkansas statute has not changed this rule, except to make the burning of other buildings arson, which at common law were not subjects of that crime.

**BURNING IS MATERIAL ELEMENT OF ARSON** under Arkansas statute, and an indictment founded thereon must aver that the property was burned. But to sustain the allegation of burning, it is not necessary to prove that any part of the house, or that the entire building, was consumed.

**PERSON ATTEMPTING TO BURN HOUSE** by setting fire to it, but failing to accomplish such burning as constitutes arson under the Arkansas statute, is guilty of a high misdemeanor.

**INDICTMENT FOR ARSON FOUNDED ON ARKANSAS STATUTE**, and charging that defendant set fire to the house with intent to injure the owner, is materially defective. It should follow the language of the statute, and charge an intent to burn the house.

**IN ARKANSAS, SLAVE COMMITTING ARSON** must be prosecuted as for a felony, though he is not to be punished by imprisonment in the penitentiary.



THE opinion states the facts.

*Garland and Randolph*, for the appellant.

*Jordan*, attorney-general, *contra*.

By Court, ENGLISH, C. J. The appellant, Mary, was indicted for arson, in the Pulaski circuit court, as follows:—

“The grand jurors, etc., present that Mary, a colored woman, slave for life, the property of Nancy Rider, late of, etc., on the eighteenth day of November, A. D. 1861, at, etc., with force and arms, feloniously, willfully, and maliciously did set fire to a certain dwelling-house of William Murray, there situate, with intent thereby then and there to injure the said William Murray, contrary to the form of the statute,” etc.

She was tried upon the plea of not guilty, convicted, and sentenced to receive five hundred lashes.

Her counsel moved in arrest of judgment, upon the grounds: 1. That the indictment charged her with no offense, etc.; 2. That the name of no person was indorsed on the indictment as prosecutor, etc.; and 3. That there was no averment in the indictment that her mistress had refused to compound the offense with the injured party, etc.

The motion in arrest was overruled, and she appealed.

1. It is insisted that the indictment is fatally defective as an indictment for arson, because it fails to allege that the house was burned.

Arson, *ab ardendo* (as it stood at common law, and independently of the provisions of acts of Parliament), is the malicious and willful burning of the house or outhouse of another man.

The burning necessary to constitute arson of a house at common law must be an actual burning of the whole, or some part of the house. Neither a bare intention, nor even an attempt to burn a house by actually setting fire to it, will amount to the offense, if no part of it be burned; but it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance; and the offense will be complete though the fire be put out or go out of itself: 4 Bla. Com. 220–223; 4 Steph. Com. 141–143; 2 Russell on Crimes, 548.

Hence, the words *incendit et combussit* were necessary in the days of law-latin, to all indictments for arson: Id. And in the precedents founded upon the common law, and not upon

statutory definitions, the words "set fire to and burn," etc., are used: 3 Greenl. Ev., sec. 51; Wharton's Precedents, 389.

Our statute (Gould's Digest, p. 338) makes it arson to burn buildings, etc., which by the common law were not the subjects of arson, but does not otherwise materially change the common-law definition of the offense. Thus:—

Sec. 1. Arson is the willful and malicious burning the house or other tenements of another person.

Sec. 2. Every person who shall willfully and maliciously burn, or cause to be burned, any dwelling-house, or other house although not herein specially named, shall be deemed guilty of arson.

Sec. 3. If any person shall willfully and maliciously burn, or cause to be burned, any state-house, court-house, prison, church, bridge, or any other public building, although not specially named, such person shall be deemed guilty of arson.

Sec. 4. If any person shall willfully and maliciously burn, or cause to be burned, any steamboat or other vessel, or any water-craft whatever, etc., he shall be deemed guilty of arson.

Sec. 5. If any person shall willfully set fire to his own building or other property, with the intent to burn the property of any other person, and the property or building of any other person shall thereby be burned, such person shall be deemed guilty of arson.

It may be seen that in each of these sections burning is a material element of the offense; and we think that an indictment founded upon any one of them should aver that the property was burned; and this conclusion is sustained by adjudications entitled to much respect: *Cochrane v. State*, 6 Md. 404; *Howel v. Commonwealth*, 5 Gratt. 664.

But, as above shown, to sustain the allegation of burning, it is not necessary to prove, upon the trial, that any part of the house, much less the entire building, was wholly consumed.

The indictment before us, though it follows a precedent to be found in 2 Archbold's Crim. Pr. & Pl., 7th ed., by Waterman, p. 710, is, we think, materially defective in not alleging that the house was burned. The precedent referred to was doubtless framed upon the English statutes.

It has been said that the words "set fire to" mean the same as to burn: 1 Bishop's Crim. Law, sec. 189; 2 East P. C. 1020; but it has been adjudicated to the contrary: *Cochrane v. State*, 6 Md. 405; *Howel v. Commonwealth*, 5 Gratt. 670; and it is safest to follow the common-law precedents.

Where a person attempts to burn a house, etc., by setting fire to it, but fails to accomplish such a burning as constitutes arson, he is guilty, by the seventh section of our statute, as well as by the common law, of a high misdemeanor. The seventh section provides that if any person shall set fire to any building or tenement of another, with intent to burn the same, although such house or tenement may not be burned, he shall be deemed guilty of a misdemeanor, and on conviction shall be fined, etc.

The indictment before us was manifestly not framed upon this section, for the indorsement upon the indictment and the record entries show that the prosecution was for arson. But if it was framed upon the seventh section, it is materially defective, because it charges that the appellant set fire to the house with intent to injure the owner, when it should have charged in the language of the statute an intent to burn the house: *Gabe v. State*, 6 Ark. 519.

2, 3. The second and third grounds of the motion in arrest of the judgment are based upon the assumption that the appellant is indicted for a misdemeanor; and her counsel insist that arson, when committed by a slave, is not a felony.

Prior to the act of the 18th of December, 1848 (Gould's Digest, pp. 383, 384), we had no statute defining felony, and the courts had to look to the common law to ascertain what offenses were to be treated as of the degree or grade of felony, and what were to be regarded as misdemeanors.

By the common law, felony is an offense which occasions a total forfeiture of either lands or goods, or both, to which capital or other punishment may be superadded, according to the degree of guilt: Bouv. Dict.

In this state, there never was any forfeiture, as a consequence of conviction of any crime, the bill of rights prohibiting it; yet the term "felony" was used in the statutes, and in criminal proceedings, before the passage of the act of the 18th of December, 1848, defining it, as denoting a grade or class of crime.

But it is argued by the counsel for appellant that the term "felony," as defined by the common law, cannot, with propriety, be applied to any offense committed by a slave, because a slave is legally incapable of owning property.

But this objection is obviated when it is borne in mind that the term "felony" was used in this state, before the act defining it, as denoting a grade or class of crimes, and not as indicating the character of punishment attached to them.

Thus it was provided by the revised statutes of 1838, pages 281, 282, that "in all trespasses and offenses, less than felony, committed by a slave, on the person or property of another person, the master may compound with the injured person, and punish his own slave, without the intervention of any legal trial or proceeding," etc.

And again: "In all cases of felony, the slave committing the same shall be tried in the same court, and the same rules of evidence observed, as in cases of white persons committing the like offense; excepting that slaves may be witnesses for and against slaves."

The act of the 18th of December, 1848, declares that "the term 'felony,' as used in the laws of the state of Arkansas, is defined to be any crime or offense which by the laws are punishable, either capitally or by imprisonment in the penitentiary, or when any portion of the punishment inflicted shall be imprisonment in the penitentiary."

Slaves were expressly excepted out of the penitentiary code (Gould's Digest, p. 385, sec. 7), and were not, at the time the act defining felony was passed, and are not now, subject to imprisonment in the penitentiary for any offense. Hence it is insisted by the counsel for the appellant that arson by a slave, not being punished capitally, is not a felony, but a misdemeanor.

It is probable that the legislature, in passing the act defining felony, had not slaves in their minds, and did not intend to embrace crimes committed by them in the definition. But if it must be concluded that they did, from the scope of the language employed, we think the proper construction of the act is that it determines the offenses that are to be treated as felonies, in criminal proceedings, without regard to the exemption of a particular class of persons from the character of punishment which is made, generally, the criterion of felony. Thus arson is a felony within the definition, because persons, generally, committing the offense are punishable by imprisonment in the penitentiary; and the class or grade of the offense being thus established, a slave committing arson must be prosecuted as for a felony, though he is not to be punished by imprisonment in the penitentiary.

Thus, in support of the reasonableness of this construction, arson was classed as a felony at common law, because it was punishable generally by a forfeiture of the property of the criminal; but it was nevertheless a felony in persons destitute

of property, and who could not be subjected to forfeiture as a punishment, but were punishable otherwise.

The consequence of a different construction of the defining act than that above indicated would be to authorize the master to compound offenses committed by his slave other than such as are punished capitally, which might not, in many instances, answer the ends of public justice, for there are but few offenses punishable with death under our criminal code.

But the indictment being materially defective in the matter above indicated, the judgment must be reversed, and the cause remanded, with instructions to the court below to sustain the motion in arrest of judgment, and hold the appellant subject to answer another indictment.

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**ARSON, WHAT CONSTITUTES.**—Arson consists in the willful, malicious, and voluntary burning of the house or outhouse of another. Such seems to be the generally accepted definition of the crime, although it is modified or enlarged by statute in a number of the states: See the principal case and *State v. Roe*, 12 Vt. 112; *Commonwealth v. Barney*, 10 Cush. 478; *People v. Myers*, 20 Cal. 76; *King v. Spalding*, 1 Leach C. C. 218; 4 Bla. Com. 220; 1 Bouv. Law Dict. 186; 1 Abb. Law Dict. 86; 1 Wharton's Crim. Law, 825; 2 Bishop's Crim. Law, sec. 8; Desty's Am. Crim. Law, 143. The crime of arson is an offense against the habitation, and regards the possession rather than the property: *Snyder v. People*, 26 Mich. 106; 2 Bishop's Crim. Law, sec. 12; *State v. Toole*, 29 Conn. 342; S. C., 76 Am. Dec. 602; *Tuller v. State*, 8 Tex. App. 501; *People v. Fairchild*, 48 Mich. 31; *Adams v. State*, 62 Ala. 177. And in California it is not necessary that the "house, edifice, structure, vessel, or other erection" should have been used as, or intended for, a habitation; it is sufficient if it is "capable of affording shelter for human beings;" therefore, the willful and malicious burning of a building not intended or not used as a habitation is not an offense against the person, rather than the property: *People v. Fisher*, 51 Cal. 320. The value of the building or buildings and contents burned is not an element of the crime: *Brown v. State*, 52 Ala. 345; *Adams v. State*, 62 Id. 177; *People v. Van Blaricum*, 2 Johns. 105. Arson in the first degree consists of willfully setting fire to or burning, in the night-time, a dwelling-house, in which there is at the time some human being: *People v. Henderson*, 1 Park. Cr. 561; *Dick v. State*, 53 Miss. 384; *Lacy v. State*, 15 Wis. 13. So a burning committed in the daytime will be punished with a less period of imprisonment than if perpetrated at night: *Brightwell v. State*, 41 Ga. 482; *Hester v. State*, 17 Id. 130.

*Malice is of Essence of Crime of Arson*, both by the common law and by statute: *Jesse v. State*, 28 Miss. 100; *Thomas v. State*, 41 Tex. 27; Desty's Am. Crim. Law, sec. 143 a. The intention is the controlling element in the crime, and the law looks to the intention with which the defendant acts, and not as to whether he was well informed of the legal consequences which may attach to his act: *McDonald v. People*, 47 Ill. 537; and it is sufficient to convict if it is proved that fire was applied to any part, or in immediate contact with the building, with an intent to burn it, though such intent is not carried out: *State v. Dennin*, 32 Vt. 158. So a party may be convicted, although it

is proved that he willfully set fire to the house, not for the purpose of injuring the party occupying the premises, but for the purpose of gaining a reward, by giving the earliest intimation of the fire at the engine station: *Rex v. Regan*, 4 Cox C. C. 335. Again, if a prisoner sets fire to a jail in which he is confined, with the intention of burning a hole through which he may escape, but without any intention of burning the building, he is guilty of arson: *Luke v. State*, 49 Ala. 30; S. C., 20 Am. Rep. 269; see also the note appended thereto 271. And if one set fire to a building with intent to burn it, and thereby another and adjoining house is consumed, he may be convicted of burning the latter: *Hennessey v. People*, 21 How. Pr. 239. So if one not intending to burn a house accidentally consumes it while endeavoring to commit some other crime of sufficient magnitude, he is guilty of arson: 2 Bishop's Crim. Law, sec. 14; and if, intending to burn the house of some particular party, he burns the house of another, though by accident, he is guilty of the crime: *Id.*, sec. 15; and it is said in 2 East P. C. 1030, 1031, that where one sets fire to his own house, with the intention of burning it for the purpose of defrauding an insurance company, and the fire so set communicates itself to the dwellings of others, consuming them, the intent being unlawful and malicious, the consequence immediately and necessarily flowing from the act makes the perpetrator guilty of arson. And the same rule is adhered to in the reasoning in *Rex v. Scofield*, Cald. 397; *Rex v. Pedley*, *Id.* 218. Contrary to the doctrine expressed in *Luke v. State*, 49 Ala. 30, S. C., 20 Am. Rep. 269, several cases are found holding that it is not arson for a prisoner to set fire to the jail in which he is confined, merely for the purpose of effecting his escape, but with no intent of consuming the building, as such burning would not be the willful burning of an inhabited dwelling-house: *People v. Cotteral*, 18 Johns. 115; *State v. Mitchell*, 5 Ired. 350; *Delany v. State*, 41 Tex. 601; and the same ruling was applied where a prisoner attempted to burn or did burn a hole in the door of a guard-house, or through the floor of the same, in an incorporated town, merely with the intention of effecting his escape: *Jenkins v. State*, 53 Ga. 33; S. C., 20 Am. Rep. 255, and see the note following the case 257. The court, however, in the case of *Delany v. State*, *supra*, say: "If a prisoner, or a number of prisoners in concert, should set fire to a jail without such definite purpose [namely, an intent merely to escape], but for the purpose of burning the jail sufficiently to produce the alarm of fire, and in the consequent confusion make an escape, being at the same time indifferent as to whether the jail was consumed or not, that would be arson." The distinction sought thus to be made in this latter case seems to us to be rather finely drawn, and the doctrine expressed in *Luke v. State*, 49 Ala. 30, S. C., 20 Am. Rep. 269, was reaffirmed in *Lockett v. State*, 63 Ala. 5, arising upon the same state of facts. The setting fire to an unfinished boat in a shop, with intent to burn the building, is not arson unless some permanent part of the building is consumed: *Commonwealth v. Francis*, Thach. C. C. 240. The burning of a building for the purpose of and with the intent of defrauding an insurance company makes one guilty of the crime: *Regina v. Gray*, 4 Fost. & F. 1102. The intent may be inferred from the facts of each case, and evidence is admissible to prove such intent: *Commonwealth v. McCarthy*, 119 Mass. 354; *State v. Watson*, 63 Me. 128; *Rex v. Taylor*, 5 Cox C. C. 138; *Brooks v. State*, 51 Ga. 612; *Regina v. Dossett*, 2 Car. & K. 306; *State v. Rohfrisch*, 12 La. Ann. 382; *People v. Shainwold*, 51 Cal. 468.

*Burning* is a material element in the crime of arson: See the principal case, and cases there cited; and there must be an actual burning of the whole or some part of the house to constitute the crime at common law: *Id.*; *Graham*



*v. State*, 40 Ala. 659; but the least burning is sufficient, — thus the charring of the floor to the depth of half an inch: *State v. Sandy*, 3 Ired. 570. The rule is the same where only a portion of the building is consumed: *People v. Butler*, 16 Johns. 203. There must be such a burning as unfits it for the purposes for which it was erected: *State v. De Bruhl*, 10 Rich. 23. But it is not necessary that any portion of the house should be actually burned: *State v. Dennis*, 32 Vt. 158. If any part of a dwelling-house is burned willfully and maliciously, no matter how small the part may be, the crime is complete: *Commonwealth v. Van Schaack*, 16 Mass. 104; *State v. Babcock*, 51 Vt. 570; *State v. Mitchell*, 5 Ired. 350; and it makes no difference if the fire is extinguished or goes out of itself: See cases last cited, *supra*; and *State v. Sandy*, 3 Id. 570. Therefore where an attempt is made to burn a house by lighting a fire, and the wood of such house is charred in a single place so as to destroy the fiber of the wood, the crime is complete, even if the fire is then extinguished: *People v. Haggerty*, 46 Cal. 354. So one is guilty of arson if he set fire to a dwelling-house, and the substance of a portion of the wood therein was actually burned, although not entirely consumed, and the fiber of the wood was not actually destroyed: *Commonwealth v. Tucker*, 110 Mass. 403. And if a wooden partition annexed to the building was charred by the fire, and in one place burned through, it is a sufficient burning to constitute the crime: *People v. Simpson*, 50 Cal. 403. Nor is it necessary to constitute a setting on fire that any flame should be visible: *Rex v. Stallion*, 1 Moody C. C. 398. And where a board from the building said to be burned is exhibited to the jury as the only part of the building which was burned, it is a question for them to decide, if it has been affected by fire so as to constitute a burning, within the legal meaning of the term: *Commonwealth v. Betton*, 5 Cush. 427. It was held in *Regina v. Russell*, Car. & M. 541, that where a small faggot was set on fire and nearly consumed on the boarded floor of a room, whereby the boards of the floor were scorched black, but not burned, and no part of the wood of the floor consumed, such burning was not sufficient to constitute arson. But if a fire set to a stack communicates to a barn, which is thereby destroyed, the crime is complete, and the perpetrator is guilty: *Rex v. Cooper*, 5 Car. & P. 535. The burning must be of something which is of the realty, and not merely personal property contained in the house: *Graham v. State*, 40 Ala. 659. The setting fire to a storehouse, with the intent that fire should be communicated to and should burn a dwelling-house situated near by, is in law deemed the burning of the latter: *Grimes v. State*, 63 Id. 166.

*Burning of What Property Constitutes.*—At common law, arson consisted of the burning of the dwelling, or of an outhouse belonging thereto: See the principal case; *McLane v. State*, 4 Ga. 339; *Desty's Am. Crim. Law*, sec. 143, c. 1; *Wharton's Crim. Law*, sec. 833; and the outhouse need not be adjoining the dwelling if the fire could be communicated from one to the other: *Id.* It seems that the building with its outhouse must be finished, or at least fit for habitation. Therefore, where the building burned was designed and built for a dwelling-house, and was constructed like one, but was not painted, though it was intended that it should be, and was not inhabited, nor was some of the glass intended for an outer door yet put in, it was held that this was not a dwelling-house, in such legal sense that the burning of it would constitute the crime: *State v. McGowan*, 20 Conn. 245; S. C., 52 Am. Dec. 236. The same doctrine is held substantially in *McGary v. People*, 45 N. Y. 153; and *State v. Woffenberger*, 20 Ind. 242; *Elmore v. St. Briavella*, 8 Barn. & Cress. 461. But the law is otherwise if the house is once inhabited as a

dwelling, though the occupant may be temporarily absent therefrom at the time of the burning: *State v. McGowan*, 20 Conn. 245; S. C., 52 Am. Dec. 336; *Johnson v. State*, 48 Ga. 116. The meaning of the word "house" is that it is a place for the dwelling and habitation of man; so a house built for a store-house, and shelved as such, but used as a dwelling-house, comes within the meaning of that term, and the burning thereof is arson: *McLane v. State*, 4 Id. 335. So is the burning of a loft situated over a coach-house and stables, but converted into lodging-rooms: Id. 339. It makes no difference that the outhouse burned was in a city, town, or village: *Smith v. State*, 64 Id. 605. The willful and malicious burning of a country church is arson: *Watt v. State*, 61 Id. 66. A barrel-house attached to a cooperage establishment is a "house," within the meaning of the statute, for the burning of which a person may be convicted: *Pike v. State*, 8 Lea, 577. So is a building thirty-six feet distant from a man's house, used for preserving nets employed in the owner's ordinary occupation of a fisherman, and also as a permanent dormitory for his servants: *Pond v. People*, 8 Mich. 151.

And so any building is a "dwelling-house," within the act, if the whole or any part thereof is usually occupied by parties lodging therein at night, although other parts, or the greater part, may be occupied for an entirely different purpose: *People v. Orcutt*, 1 Park. Cr. 252. If at the time the house is fired there is a human being therein, it is immaterial whether he is asleep or awake, or whether escape is practicable or not before the building actually takes fire: *Woodford v. People*, 62 N. Y. 117; S. C., 20 Am. Rep. 464. The burning of a stable, independently of its contents, is a subject of the crime: *Chapman v. Commonwealth*, 5 Whart. 427. Especially if the barn has hay and grain in it: *Sampson v. Commonwealth*, 5 Watts & S. 385. So a barn constituting part of the necessary buildings of a farm, although not adjoining nor connected with the dwelling-house thereon, yet so situated that its destruction by fire would endanger the dwelling-house, is a barn "belonging" to such dwelling-house within the meaning of the act, and the setting fire thereto constitutes felonious arson: *Hill v. Commonwealth*, 98 Pa. St. 192. So is a building of hewn logs, divided by partitions of the same, having horses upon one side and farm produce upon the other, while adjoining were sheds, under which were wagons and other farming utensils: *State v. Cherry*, 63 N. C. 493. In England a thatched pig-sty in a yard has been held to be an outhouse, the burning of which will constitute arson: *Regina v. Jones*, 2 Moody C. C. 308. And so does the burning of a stack, if the fire communicates to a barn and thereby burns it: *Rex v. Cooper*, 5 Car. & P. 535; in the same category is a stack of straw: *Rex v. Turner*, 1 Moody C. C. 239. But on the other hand it has been held not to constitute the crime to burn and destroy in the nighttime stacks of hay and ricks of corn fodder: *State v. Pope*, 11 S. C. 273; and it is said not to constitute arson either at common law or under the statute to burn a stack of hay: *Creed v. People*, 81 Ill. 565. In the law of arson, the curtilage of the dwelling-house is such space as is necessary and convenient and is habitually used for family purposes. It may include a garden, and need not be separated from other lands by fences. The burning of a barn within such inclosure is arson: *State v. Shaw*, 31 Me. 523; *Commonwealth v. Barney*, 10 Cush. 480, where it was held that such curtilage might consist of a fenced inclosure, or partly fenced, and otherwise inclosed by the exterior walls of buildings. A barn eighty feet from the dwelling, in a yard or lane, and to which communication is had through a pair of bars, is within the curtilage, and a subject of the crime: *People v. Taylor*, 2 Mich. 250. So under the New York statute, a barn, shop, warehouse, or other



building, adjoining to or within the curtilage of an inhabited dwelling-house, so that the burning of the barn or other building would endanger the house, is the subject of the crime. But the word "adjoining" means actual contact: *Peeverly v. People*, 3 Park. Cr. 59; and in *Gage v. Sheldon*, 3 Rich. 248, the burning of a stable is said to be arson, if such stable is within the curtilage of the dwelling-house. And so is the burning of a cotton-house, if the dwelling-house was also burned thereby: *Cheatham v. State*, 59 Ala. 40; *Washington v. State*, 68 Id. 85. But a barn some distance from the dwelling, with a highway between, and a yard between the barn and the highway, is not within the curtilage, so that the burning of it constitutes the crime: *Curbendall v. People*, 36 Mich. 309. The burning of a school-house is arson: *State v. O'Brien*, 2 Root, 516; *Wallace v. Young*, 5 T. B. Mon. 155; *Jones v. Hungerford*, 4 Gill & J. 402. So is a building erected and removed by a city, and afterwards fitted up as a school-house and engine-house: *Commonwealth v. Horrigan*, 2 Allen, 159. And again, a church has been held to be a building within the statute, and the subject of arson: *King v. Hickman*, 1 Leach C. C. 318. So has a house used exclusively as a warehouse for storing goods, although the goods belonged to a tenant, and the house had been constructed and formerly used for an entirely different purpose: *Allen v. State*, 10 Ohio St. 287. And so has a building used by a carpenter, who was erecting a house close by, as a place to leave his tools and window-frames made by him, although he carried on no work in the building burned: *Regina v. Smith*, 14 U. C. Q. B. 546. Within the meaning of 24 and 25 Victoria, is a shop used for carrying on the grocery business: *Queen v. Newbould*, L. R. C. C. 344; and so is an unfinished dwelling-house, having the external and inner walls built and the roof on, with a considerable portion of the floors laid, and the ceiling and walls prepared for plastering: *Regina v. Manning and Rogers*, 12 Cox C. C. 106; compare with *State v. McGowan*, 20 Conn. 245; S. C., 52 Am. Dec. 336, and cases there cited as sustaining the doctrine therein set forth. In Virginia, it has been held that a house unoccupied as a dwelling-house at the time it was burned, although constructed as a dwelling and had been used as such, and was about to be used as such again, is not the subject of arson: *Hooker v. Commonwealth*, 13 Gratt. 763. Neither is a dwelling-house never occupied as such: *Commonwealth v. Barney*, 10 Cush. 478. Nor is a house setting on blocks in a stable-yard, such house having two rooms, one used for storing refuse corn and the other for storing other farm products, such a house as is within the meaning of the statute: *State v. Laughlin*, 8 Jones L. 455. A saw-mill is not necessarily a building within the meaning of the New Hampshire statute: *State v. Livermore*, 44 N. H. 386. Nor is a mill-house the subject of arson, in North Carolina: See *State v. Upchurch*, 9 Ired. 454. The remains of a wooden building, once used as a dwelling-house, but partially destroyed by fire, with only a few rafters on the roof, and injured in the walls and ceiling so as to be uninhabitable, but undergoing repairs, is not a subject of the crime: *Regina v. Labadie*, 1 G. C. L. Rep. 204; S. C., 32 U. C. Q. B. 429. Where a building consisted of an upright and "lean-to," and the upper story of the upright was occupied as a dwelling and reached by an outside flight of stairs, while the rest of the building was used as a store, one cannot be convicted of burning that portion of the building occupied as a dwelling, when the fire was started in the "lean-to:" *People v. Fairchild*, 48 Mich. 31. A jail has been held not such a dwelling-house as may be the subject of arson: *People v. Ootseral*, 18 Johns. 115; *State v. Mitchell*, 5 Ired. 350; *Delany v. State*, 41 Tex. 601; *Jenkins v. State*, 53 Ga. 33; S. C., 21 Am. Rep. 255; *contra: Lube v. State*, 49 Ala. 30; S. C., 20 Am. Rep. 269; *Lockett v. State*, 63 Ala. 5.

*Who may Commit.*—It is not arson under the common law, and in some of the states, for one to destroy his own house by fire: *Holmes's Case*, Cro. Car. 376; *State v. Haynes*, 66 Me. 307; S. C., 22 Am. Rep. 569; *State v. Lyon*, 12 Conn. 487; *King v. Breem*, Leach C. C. 220; *Bloss v. Tobey*, 2 Pick. 320; especially while he is lawfully occupying it: *State v. Hannett*, 54 Vt. 83. In a number of states, however, it is held that one is guilty of the crime if he burns his own house: *Commonwealth v. Erskine*, 8 Gratt. 624; *Shepherd v. People*, 19 N. Y. 537, overruling *People v. Gates*, 15 Wend. 159, and *People v. Henderson*, 1 Park. Cr. 560; *State v. Rohfrisch*, 12 La. Ann. 382; *State v. Elder*, 21 Id. 157; if he burn it willfully and maliciously: *State v. Hurd*, 51 N. H. 176; knowing at the time that the result will be injurious to the property of another: *Queen v. Bryans*, 12 U. C. C. P. 165. So one may be found guilty of arson, if by burning his own house the dwelling of another is thereby burned: *Holmes's Case*, Cro. Car. 376; *King v. Peddie*, 1 Leach C. C. 242. Or if one destroys his house or outhouse, willfully and maliciously, for the purpose of obtaining the insurance thereon: *People v. Henderson*, 1 Park. Cr. 560; *Shepherd v. People*, 19 N. Y. 536; *McDonald v. State*, 47 Ill. 533; *State v. Babcock*, 51 Vt. 570; *People v. Hughes*, 29 Cal. 257; *People v. Schwartz*, 32 Id. 160; *Martin v. State*, 28 Ala. 71; *Queen v. Bryans*, 12 U. C. C. P. 161; *Rex v. Gibson*, Russ. & Ry. C. C. 137. But if the owner procures his servant to burn his dwelling-house for such purpose, neither of them can be convicted for such burning: *State v. Haynes*, 66 Me. 307; S. C., 22 Am. Rep. 569. Compare with *Allen v. State*, 10 Ohio St. 287, asserting the contrary rule. But if a father burns a house which he has conveyed to his sons, for the purpose of getting the insurance, he is guilty: *Commonwealth v. Bradford*, 126 Mass. 42.

One is guilty of arson if he burns his house while in the possession of another: *State v. Toole*, 76 Am. Dec. 602. Thus, while his servant dwelt in it: *Davis v. State*, 52 Ala. 357. But a husband, while living with his wife and having a rightful possession jointly with her, is not guilty of the crime if he burns the dwelling-house which she owns and they both occupy: *Snyder v. People*, 26 Mich. 106; S. C., 12 Am. Rep. 303. Nor is a wife guilty who destroys her husband's house by burning it: *Rex v. March*, 1 Moody C. C. 182. But the wife may commit the crime by burning the house of another, and of which her husband has the wrongful possession: *Rex v. Wallis*, Id. 344. A lessee cannot be guilty of arson in burning the premises occupied by him as such: 2 East P. C. 1029; *State v. Lyon*, 12 Conn. 486. This rule was held to maintain in the case of a tenant for a year: *McNeal v. Woods*, 3 Blackf. 485. Again, in the case of a tenancy from year to year: *King v. Peddie*, 1 Leach C. C. 242. But if by burning the house of which he is in possession he burns that of another, he is guilty: Id. A tenant in possession of a copyhold is not guilty of arson in burning the house upon it in his possession, although such copyhold estate had been rendered to the use of the mortgagee. Such house is not the house of another while in the possession of the tenant: *King v. Spalding*, Id. 218. Nor is a tenant in possession guilty who burns the house, where such tenant holds under an agreement for a lease for three years, from a lessee who held under a building lease: *King v. Breeme*, Id. 220; *State v. Tish*, 27 N. J. L. 223; and *State v. Sandy*, 3 Ired. 570; *Sullivan v. State*, 5 Stew. & P. 175. In Missouri the rule is different under the statute, and it is there held that a tenant may commit arson by burning the house occupied by himself: *State v. Moore*, 61 Mo. 276. Such seems to be the rule in California: *People v. Simpson*, 50 Cal. 304. If the landlord burn the house during the occupancy of his lessee, he is guilty: *Desty's Am. Crim. Law*, sec. 143 e, and cases cited; and a mortgagor may commit the

crime, if in possession, by burning his own house: 2 East P. O. 1025. As to whether a slave may commit arson, consult the principal case and *Martha v. State*, 28 Ala. 72.

**INDICTMENT — NECESSARY ALLEGATIONS. — Ownership.** — The allegations necessary to an indictment for arson are regulated by statute in the major portion of the states, and a number of them have followed the common-law rule that in the indictment the ownership of the house burned must be alleged, and must be proved as laid: *Martha v. State*, 28 Ala. 72; *Carter v. State*, 20 Wis. 646; *Graham v. State*, 40 Ala. 659; *Fuller v. State*, 8 Tex. App. 501; *McGary v. People*, 45 N. Y. 153; *Commonwealth v. Wade*, 17 Pick. 395; *People v. Gates*, 15 Wend. 159. A count in the indictment which does not charge the ownership of the property alleged to have been burned is substantially defective on motion in arrest of judgment: *Martin v. State*, 28 Ala. 71. The averments in an indictment as to the ownership of the building burned are part of the description of the offense of arson, and they must be direct and certain as to the ownership of the property which the defendant is accused of burning; and such indictment must also allege that the dwelling burned was the property of the party who at the time was occupying it in his own right: *State v. Bradley*, 1 Houst. C. C. 164; *People v. Myers*, 20 Cal. 76; for if an indictment for arson leaves the question of ownership to be made out by argument, or open to conjecture, it is demurrable; as in a case where the averment as to the ownership is, "which said dwelling-house was then and there the property of one Lemon, and was then and there the dwelling-house of one Chinaman, a human being, whose real name is to the jurors unknown": *People v. Myers*, *supra*. So where the indictment contains two averments as to the ownership, repugnant to each other, but either of which is good without the other, it is open to demurrer: *Id.* An indictment according to the common-law form is sufficient, if the arson was committed in the daytime: *Curran's Case*, 7 Gratt. 619. The rule would, however, seem to be different in reference to a public building which has been burned, for it has been held that in such case the indictment need not allege who is the owner or occupant: *Mott v. State*, 29 Ark. 146; such averment, if made in such case, is immaterial: *State v. Roe*, 12 Vt. 93. An indictment which alleged that the building burned was the property of one not the owner, but of one who was occupying it as a residence at the time when it was burned, was held sufficient: *People v. Wooley*, 44 Cal. 494. And in an indictment for arson, the ownership of the property is well laid, in the widow of the deceased owner, who had used and occupied it since the death of her husband, although there were heirs living, and no dower had as yet been assigned: *State v. Gailor*, 71 N. C. 88; S. C., 17 Am. Rep. 3; see also *Snyder v. People*, 12 Id. 303; *State v. Moore*, 61 Mo. 276. And an allegation in the indictment that the accused set fire to or burned a dwelling-house belonging to or the property of a certain person, naming him, is a sufficient allegation of ownership, as the possessor thereof, for the purposes of the statute, is the owner, and the presumption flowing from such allegation is that the party named is in possession: *Woodford v. People*, 62 N. Y. 117; S. C., 20 Am. Rep. 464.

It is essential that the indictment aver that the building burned is the property of another than the one committing the crime: *People v. Myers*, 20 Cal. 79; *State v. Lyon*, 12 Conn. 486; *State v. Tennery*, 9 Iowa, 438. And the house which has been burned should not be described as the house of two persons, who occupy separate portions of it. Each apartment occupied in severalty should be alleged to be a separate house. Thus in case of a lodging-house, it should be averred to be the house of the keeper, for the lodgers

occupy it under him: *State v. Toole*, 76 Am. Dec. 602. If a tenant has actual possession, and his term has not yet expired, the indictment must state the property burned to be in the lessee: *State v. Mason*, 13 Ired. 341. But it has been held that an indictment for arson, which charged the defendant with setting fire to "the barn of one Laura Wolf" was not open to the objection that it did not sufficiently state that the barn was in the actual possession of the party named, in her own right: *Wolf v. State*, 53 Ind. 30. This adjudication would seem to overrule *Ritchy v. State*, 7 Blackf. 168, holding that the indictment must allege that the property burned or set fire to was the property of the person in actual possession in his own right. And in an indictment for arson in the second degree, it is not necessary to allege the building burned to be the property of the occupant; it may be described as the property of the owner, though occupied by a tenant: *People v. Fisher*, 51 Cal. 319; see also *People v. Shainwood*, Id. 468. And the apartment of a tenant of a tenement house may be averred to be his "house," or "dwelling-house": *Levy v. People*, 80 N. Y. 327. So in an indictment for arson, although the building burned is situated on the premises of another, the ownership is properly laid in the name of a servant, who dwelt in the house, the owner having given her possession for that purpose, under a contract of hire which bound him to do so, as long as she remained in his service: *Davis v. State*, 52 Ala. 357. The ownership of the building is properly laid in M., in an indictment charging the felonious burning of the dwelling-house of A., if the building is actually owned by M., and occupied in the lower story by the accused as a store or shop, the burning of which set fire to the dwelling of A.: *State v. Kroscher*, 24 Wis. 64.

An indictment which avers that the defendant did burn a barn, "then and there belonging to one J. S.," sufficiently alleges the ownership of the property: *Commonwealth v. Hamilton*, 15 Gray, 481. So does one alleging the house burned to have been occupied by Hattie Taylor as a residence: *Younis v. Commonwealth*, 12 Bush, 243. And again it is sufficient to allege the ownership to be in defendant, when in fact it belonged to a partnership of which he was a member: *Commonwealth v. Goldstein*, 114 Mass. 272. So where the indictment describes the property burned as "the county jail and prison of the county of H., being the house of L. J., sheriff and jailer of said county, this is a sufficient allegation as to the ownership: *Stevens v. Commonwealth*, 4 Leigh, 683. And an indictment which describes the property burned as "the jail of Talladega County, which said jail or building was erected for public use," is sufficient, without further averment of ownership: *Lockett v. State*, 63 Ala. 5. Actual occupation and possession is sufficient to sustain the allegation of ownership: *State v. Taylor*, 45 Me. 322.

*Description of Property.*—The common-law form of indictment for arson simply charges defendant with burning a house, without charging such house to be a dwelling-house: 1 Wharton's Crim. Law, sec. 840; 2 Bishop's Crim. Proc., sec. 33; *Commonwealth v. Posey*, 4 Call, 109; S. C., 2 Am. Dec. 560. Indictments which describe the property burned as the house of the party residing therein are good: *State v. Toole*, 76 Id. 602; *State v. Sutcliffe*, 4 Strob. 372-402. As to the meaning of the word "house" in this connection, see the note appended to *Workman v. Ins. Co.*, 22 Am. Dec. 144. When the statute uses the word "dwelling-house," such word must generally be employed in the indictment charging arson, and Bishop says that the word "house," having a broader signification, will not suffice: 2 Bishop's Crim. Proc., sec. 34. But where the indictment charges that defendant set fire to and burned a certain house used as a dwelling-house in the night-time, the property of

M. H., in the county of H., it is good: *McLane v. State*, 4 Ga. 338. So an indictment charging arson and describing the building, which has been usually occupied by persons lodging therein at night, as a "dwelling-house," although it may not be such house in the ordinary and popular acceptation of that term, is sufficient: *People v. Orcutt*, 1 Park. Cr. 252. And an indictment charging defendant with burning "a certain other house called a barn and stable of one R., there situate, the same being an outhouse not adjoining the dwelling-house, nor under the same roof, but some persons usually lodging therein at night, to wit," etc., is sufficient under the Virginia statute; "a dwelling-house," in such statute, embracing all its parcels, and including such outhouse as a parcel thereof: *Page v. Commonwealth*, 26 Gratt. 943. So a charge that defendant "set fire to a certain grist-mill, then and there being owned by and in the possession of one W.," is a sufficient description of the property: *People v. Haynes*, 55 Barb. 450; S. C., 38 How. Pr. 369. A description that the property burned belonged to Pearce and Bensley, and had been formerly occupied by Vanarsdale & Co., is sufficient to identify the property: *People v. Shainwold*, 51 Cal. 468. Where the indictment charged the burning of a "certain building commonly known and called a sugar-house," but without alleging that the "sugar-house" did not constitute a dwelling-house or its out-buildings, it was held good, as the statute did not use the term "sugar-house," though specially mentioning other buildings which may be subject of arson": *State v. Ambler*, 56 Vt. 672.

Nor is it necessary to state that a barn burned was not a parcel of the dwelling-house: *Staeger v. Commonwealth*, 103 Pa. St. 469; neither is an indictment defective which describes the property burned as a "house or building," these words being used evidently in a synonymous sense to designate the same property: *State v. Moore*, 61 Mo. 276. But one is defective which charges that defendant "feloniously, willfully, and maliciously did set fire to and burn a certain barn of one J., there situate, contrary to the form of the act of assembly," etc.; it should further charge that such barn was "not a parcel of the dwelling-house," as this is an essential part of the description, and cannot be omitted: *Gibson v. State*, 54 Md. 447; and an indictment is bad which charges defendant with setting fire to and burning a "certain building called a saloon," in this, that it does not show for what purpose the building was occupied: *State v. O'Connell*, 26 Ind. 266. Under a statute providing that "every person who shall willfully set fire to or burn in the night-time, any store or warehouse not adjoining to or within the curtilage of any inhabited dwelling-house, so that such house shall not be endangered by such firing, shall, upon conviction, be adjudged guilty of arson," etc., it is not necessary in an indictment charging the burning of such building to negative the exception contained in the statute, and allege that the house burned was not within the curtilage of an inhabited dwelling-house as specified in the statute: *People v. Pierce*, 11 Hun, 633. An indictment alleging that defendant burned a certain building called a barn, but not stating whether or not a dwelling-house was thereby burned, is good, under the New Hampshire statute: *State v. Emerson*, 53 N. H. 619.

*Intent.*—At common law, the indictment for arson must allege the intent at the time of the burning to have been that it was willfully and maliciously as well as feloniously done: 1 Wharton's Crim. Law, sec. 839; Bishop's Crim. Proc., sec. 42; see also the principal case. Such was the rule at an early date in some of the states: *State v. Gaffrey*, 4 Chand. 165. It seems that there must be an allegation of felonious intent: *Mott v. State*, 29 Ark. 147; *State v. Johnson*, 19 Iowa, 230; for without such allegation the indictment is

fatally defective: *State v. Hoper*, 88 N. C. 656. Of course, an allegation that defendant "feloniously, willfully, and maliciously did burn and cause to be burned," would be sufficient: *People v. Myers*, 20 Cal. 76; *Polsten v. State*, 14 Mo. 463; *State v. Simpson*, 2 Hawks, 460. The indictment must charge the crime to have been done maliciously, and charging it to have been done "feloniously, willfully, and unlawfully" is insufficient: *Kellenbeck v. State*, 69 Am. Dec. 166; for the indictment is essentially defective, and must be quashed unless it avers that the act of burning was committed maliciously: *Jesse v. State*, 28 Miss. 100. But the indictment need not charge in direct terms that the burning was willfully done, for an allegation that the defendant did the burning "unlawfully, maliciously, and feloniously" is equivalent to a charge that the act was willfully done, for it is in fact an averment that it was designed, intended, and hence willful: *People v. Haynes*, 55 Barb. 450; S. C., 38 How. Pr. 369; *Chapman v. Commonwealth*, 5 Whart. 427. And an allegation that the prisoner "willfully and feloniously" set fire to the building is equivalent to an averment that the act was done "willfully, maliciously, and unlawfully": *Young v. Commonwealth*, 12 Bush, 243. So an indictment which charges that defendant willfully set fire to and burned a "building erected for a dwelling-house" sufficiently charges the intent: *Commonwealth v. Squire*, 1 Met. 258. And again, an indictment sufficiently alleges the intent with which the burning was done, if it charges the act to have been willfully done. It is not necessary that the indictment should aver in terms that defendant, with intent to burn, set fire to the house and burned the same: *Thomas v. State*, 41 Tex. 27. In North Carolina, an indictment for arson is defective which omits the allegation that the burning was done with "intent to injure and defraud" some person: *State v. England*, 78 N. C. 352; *State v. Porter*, 90 Id. 719. But in Maine, the indictment need not expressly allege the intent, when the crime is committed by directly setting fire to the dwelling-house of another: *State v. Hill*, 55 Me. 365. The indictment in this case contained the allegation that the burning was done "feloniously, willfully, and maliciously." From this allegation, as we have seen, the intent is presumed. In an indictment for setting fire to an insured building, it is necessary to allege the guilty intent, namely, that the prisoner set the fire with intent to injure the insurer: *Staadon v. People*, 82 Ill. 432; *Queen v. Bryans*, 12 U. C. C. P. 161; *People v. Schwartz*, 32 Cal. 160; *Commonwealth v. Goldstein*, 114 Mass. 272.

*Burning.*—In common-law indictments, the allegation charging the criminal act in the crime of arson employs the word "burn": 1 Bishop's Crim. Proc., sec. 613; 2 Id., sec. 46. Perhaps the better practice would be to use both the words "set fire to" and "burn," or at least to follow the words of the statute; for it has been determined that it is not sufficient to use the words "set fire to" the building; but that the word "burn" must be employed, that being the word used in the statute to define the crime of arson: *Howel v. Commonwealth*, 5 Gratt. 664. Maintaining the same rule, see *Curran's Case*, 7 Id. 619; *Page v. Commonwealth*, 26 Id. 943. The Wisconsin statute contains the word "burn," and the indictment must follow the statute: *State v. Gaffrey*, 4 Chand. 165. Such is the rule in Arkansas: See the principal case; also *Mott v. State*, 29 Ark. 147. And in Maryland, in the case of *Cochrane v. State*, 6 Md. 400, it is held that an indictment alleging that the accused "feloniously, unlawfully, and maliciously did set fire to a certain dwelling-house," is defective, as it does not charge that the house was "burned," because at common law neither an attempt nor an intention to burn a house will amount to arson unless some part is actually burned; and the word "burn" is neces-



sary in all indictments charging the crime. An averment that defendant "burned and caused to be burned" is sufficient: *State v. Price*, 11 N. J. L. 203; or "did set fire to, burn, and consume": *State v. Simpson*, 2 Hawks, 460. In the case of *Howel v. Commonwealth*, 5 Gratt. 670, the court say: "We are not satisfied that 'setting fire to' and 'burning' have been established by any legal authority to be synonymous, so as to justify, in an indictment upon the statute, substitution of the former words in the place of the other." This is an early case (1848), and ten years later we find the court in Maine holding that in an indictment upon the statute containing the word "burn," it is sufficient to allege that defendant "set fire to" the building: *State v. Taylor*, 45 Me. 322. In many of the states, the allegation that the accused "set fire to" the building is sufficient: *Mitchell v. State*, 5 Coldw. 53; *People v. Myers*, 20 Cal. 76; *Wolf v. State*, 53 Ind. 30; *Woodford v. People*, 62 N. Y. 117; S. C., 20 Am. Rep. 464; or that he "set fire to and caused to be burned": *State v. Johnson*, 19 Iowa, 230; or that defendant "did set [omitting the word "fire"] to the building, then and there, by the spreading of such fire, did burn and consume," is good. This under a statute the words of which are, "every person who shall set fire to and burn," etc.: *Polsten v. State*, 14 Mo. 463.

*Value.* — Where the punishment depends upon the value of the property burned, an indictment for arson is defective which does not allege the value of the property destroyed: *Ritchey v. State*, 7 Blackf. 168; *Clark v. People*, 1 Scam. 117. But when the punishment does not depend upon such value, it need not be charged: *Commonwealth v. Hamilton*, 15 Gray, 480. As the value of the building and contents burned is not an element of the crime in the third degree, in Alabama, it need not be averred: *Brown v. State*, 52 Ala. 345.

*Human Being in House.* — In drawing an indictment for arson under a statute which makes it an aggravated crime to burn a building in which a human being is staying, lodging, or residing, the indictment must charge that there was such being in the house at the time of the burning, and the words of the statute in this respect must be set out in full: *Dick v. State*, 53 Miss. 384; *State v. Aguila*, 14 Mo. 130; *Page v. Commonwealth*, 26 Gratt. 943; *Lacy v. State*, 15 Wis. 13; *Beaumont v. State*, 1 Tex. App. 533; *Woodford v. People*, 62 N. Y. 117; S. C., 20 Am. Rep. 464. But the indictment need not state the name of the person in the house at the time that the burning takes place: *State v. Aguila*, 14 Mo. 130. And where the accused is charged with the burning of several houses, and the indictment alleges that there was "within such dwelling-houses some human being," an objection that this allegation imported but one being in all the houses, without specifying in which, and that therefore there was no sufficient allegation as to any, is untenable; for the fair construction of the language is, that there was a human being in each: *Woodford v. People*, 62 N. Y. 118; S. C., 20 Am. Rep. 464.

*DEGREES.* — In those states having a statute which divides arson into different degrees according to the circumstances under which the crime is committed, and providing different punishments for the different degrees, "the indictment must allege the distinguishing circumstances of the degree for which the punishment is to be inflicted": 2 Bishop's Crim. Proc., sec. 48 a, citing *Brown v. State*, 52 Ala. 345; *Woodford v. People*, 62 N. Y. 117; S. C., 20 Am. Rep. 464. As to the form of indictment in such case, see *Cheatham v. State*, 59 Ala. 41. An indictment charging arson in the first degree will not support a conviction for the crime in the third degree: *Dedien v. People*, 22 N. Y. 178, reversing the decision of the supreme court in the same case,

reported in 4 Park Cr. 593. And so where the statute divides arson into three degrees, clearly defining the circumstances which constitute the crime in the first and second degrees, and further providing that "arson committed under such circumstances as do not constitute arson in the first or second degree, is arson in the third degree," an indictment merely alleging the crime in the general terms of the statute, and following analogous forms given for the higher degrees, without averring any facts or circumstances constituting the offense in such higher degrees, is necessarily an indictment in the third degree: *Brown v. State*, 52 Ala. 345.

**Place.** — The crime of arson being local in its nature, the allegation in the indictment as to the locality of the property burned should be reasonably certain in this particular. It has been held that a local description is required, and that the words "there situate" are material: *State v. Gaffrey*, 4 Chand. 165. And so where the indictment described the building burned as being in the sixth ward of New York City, when in fact it was in the fifth ward of that city, it was held that the accused could not be convicted under the indictment: *People v. Slater*, 5 Hill, 401. The later cases allow a more liberal allegation as to the locality of the property burned, as an averment in the indictment is sufficient which states that the defendant at a time named, in the county where the indictment was found, then and there feloniously burned a building, is sufficient: *People v. Wooley*, 44 Cal. 494. So an indictment is good which charges that the accused "did, in the county of Grayson, willfully burn certain prairie, the said prairie not being his own": *State v. White*, 41 Tex. 64. And an indictment for burning a barn situated in a certain place, within the jurisdiction of the court, sufficiently describes the location of the barn when it alleges it to be within the curtilage of the dwelling-house of A; and it need not also aver that such dwelling-house is located in the place first named: *Commonwealth v. Barney*, 10 Cush. 480. Again, an indictment alleging that the prisoner "at P., in the county of H., did willfully and maliciously set fire to and burn a certain barn, . . . and the said barn did then and there voluntarily burn and consume," contains a sufficient averment as to the locality of the barn: *Commonwealth v. Lamb*, 1 Gray, 493; to the same effect is *State v. Price*, 11 N. J. L. 203.

**ATTEMPTS.** — An indictment for an attempt to burn a building need not describe the combustible materials used for that purpose: *Commonwealth v. Flynn*, 3 Cush. 529; *McDade v. People*, 29 Mich. 50. Nor need it state the particular manner in which the attempt was made: *People v. Bush*, 4 Hill, 133. See also *State v. Johnson*, 19 Iowa, 233. Under an indictment for arson, a party may be convicted of an attempt to commit the crime: *Young v. Commonwealth*, 12 Bush, 243. An indictment for an attempt to burn a building is not bad for duplicity, although it sets forth a breaking and entering as well as an attempt to burn it, after the breach and entry: *Commonwealth v. Harney*, 10 Met. 423.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**CALIFORNIA.**

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**PEOPLE v. TINDER.**

[19 CALIFORNIA, 539.]

**ADMISSION TO BAIL IS RIGHT OF ACCUSED** which no judge or court can properly refuse, except in capital cases where the proof is evident or the presumption great.

**STATUTE MAKING ADMISSION TO BAIL MATTER OF DISCRETION**, in all cases where the punishment is death, would conflict with the California constitution, in so far as it affected cases other than those where the proof is evident or the presumption great.

**INDICTMENT IN CALIFORNIA IS MORE THAN MERE ACCUSATION** based upon probable cause, being an accusation based upon legal testimony of a direct and positive character, and the concurring judgment of at least twelve of the grand jurors that upon the evidence presented to them the defendant is guilty.

**GRAND JURY OUGHT TO FIND INDICTMENT** when all the evidence before them taken together is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by a trial jury; otherwise, they should not find an indictment.

**INDICTMENT FOR CAPITAL OFFENSE FURNISHES OF ITSELF PRESUMPTION OF GUILT** too great to entitle defendant to bail as a matter of right under the California constitution, or as a matter of discretion under the state legislation in that regard.

**FINDING OF GRAND JURY CANNOT BE REVIEWED ON APPLICATION FOR BAIL** in capital cases, as no provision is made by statute for preserving the testimony taken before such jury, and particularly as the disclosure of such testimony, except in certain named cases, is impliedly prohibited.

**PRESUMPTION OF GUILT ARISING FROM INDICTMENT IN CAPITAL CASES**, on application for bail, cannot be rebutted by affidavits or oral testimony as to the guilt or innocence of the accused, except under special and extraordinary circumstances, and malice or mistake in the institution of the prosecution cannot be considered as such a circumstance.

**WHAT ARE CIRCUMSTANCES OF EXTRAORDINARY CHARACTER, ON APPLICATION FOR BAIL** in capital case, after indictment, as will justify the consideration of evidence offered to rebut the presumption of guilt arising from the indictment, stated. Among such are the existence, at the time of the indictment, of great popular excitement against the prisoner likely to bias or warp the judgment of the grand jurors; the existence of the party charged to have been murdered; or a clear confession of guilt by another.

**BAIL MAY SOMETIMES BE ALLOWED IN CAPITAL CASES AFTER INDIOTMENT**, though no special or extraordinary circumstances exist. As where the public prosecutor admits that under the evidence obtainable, no conviction of a capital offense can be had; or where on the trial the jury have disagreed; or where, after verdict, a new trial has been granted on the ground of insufficiency of the evidence to sustain the verdict of guilty. In such cases the court may, in its discretion, without further evidence of the guilt or innocence of the accused, allow bail.

**IN CAPITAL CASE, AFTER INDIOTMENT, BAIL MAY SOMETIMES BE ALLOWED**, independently of the merits of the prosecution, as where the trial is unreasonably delayed or postponed from term to term, even upon sufficient reasons; or where an event happens which ends or postpones indefinitely the further prosecution of the proceeding, as by repeal of the statute giving jurisdiction to try the indictment, without conferring the jurisdiction on another tribunal, or where the law creating the offense charged has been repealed without a reservation of the penalty for past offenses.

**APPLICATION for bail.** The opinion states the facts.

*L. Quint*, for the application.

*F. M. Pixley*, attorney-general, *contra*.

By Court, FIELD, C. J. The defendants were indicted for the murder of William Carrol by the grand jury of Tuolumne County, at the January term of the court of sessions of that county, and their application to the county judge to be admitted to bail was refused. They now make a similar application to this court based upon the papers used and the evidence taken before the county judge. The papers are the indictment, which is in the usual form, and one which would sustain a conviction of murder in the first degree, and the bench-warrant issued to the sheriff upon the filing of the indictment. The evidence consists of the depositions of several witnesses, detailing the circumstances attending the homicide, and which go to show that the offense is less in degree than that for which the defendants are indicted, if not to change the entire character of the act. The counsel of the defendants offers to produce before us the witnesses examined by the county judge, if objection be taken to the form in which the evidence is presented, and by stipulation between him and

the attorney-general, the application is considered as made upon a return to a writ of *habeas corpus* issued for the purpose of giving bail under the statute. The attorney-general resists the application mainly upon two grounds, which, without using his language, may be stated substantially as follows: 1. That the indictment of itself furnishes so great a presumption of the defendants' guilt as to deprive them of the right right to bail; and 2. That the finding of the grand jury cannot be reviewed on the application, or its effect in creating such a presumption against the defendants be repelled by affidavits or oral testimony as to their guilt or innocence.

1. The constitution of the state declares that "all persons shall be bailable by sufficient sureties unless for capital offenses, where the proof is evident or the presumption great": Art. 1, sec. 7. The criminal practice act, however, provides that "a person charged with an offense may be admitted to bail before conviction, as follows: 1. As a matter of discretion in all cases where the punishment is death; 2. As a matter of right in all other cases"; and that "no person shall be admitted to bail when he is charged with an offense punishable with death, when the proof is evident or the presumption great": Secs. 509, 510. The constitution, as will be thus seen, secures to the citizen accused the right to bail in all cases, except when charged with a capital offense, and even then, unless the proof of guilt is evident or the presumption of it is great. The statute, on the other hand, renders the admission to bail a matter of discretion, where the punishment is death, unless such evident proof or great presumption exist. In this respect the statute conflicts with the fundamental law. The admission to bail in capital cases, where the proof is evident or the presumption is great, may be made a matter of discretion, and may be forbidden by legislation, but in no other cases. In all other cases, the admission to bail is a right which the accused can claim, and which no judge or court can properly refuse.

The inquiry, then, arises as to the effect of the indictment in creating a presumption of the defendants' guilt. Formerly an indictment was regarded as a mere accusation, which the grand jury ought to find if probable evidence were adduced in its support. "But great authorities," says Chitty, "have taken a more merciful view of the subject, and considering the ignominy, the dangers of perjury, the anxiety of delay, and the misery of a prison, have argued that the grand inquest ought, as far as the evidence before them goes, to be con-

vinced of the guilt of the defendant. What was, therefore, anciently said respecting petit treason may be applied to all other offenses; that since it is preferred in the absence of the prisoner, it ought to be supported by substantial testimonies": 1 Crim. L. 318. The more merciful view of the subject thus referred to is secured by statute in this state. Our criminal practice act declares that the grand jury "shall receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence" (sec. 210); and though not bound to hear evidence for the defendant, "that it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced" (sec. 211); and that they "ought to find an indictment when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury" (sec. 212); and of course ought not to find an indictment when the evidence, taken together, if unexplained or uncontradicted, would not warrant such conviction. The indictment is, then, something more than a mere accusation based upon probable cause; it is an accusation based upon legal testimony, of a direct and positive character, and is the concurring judgment of at least twelve of the grand jurors, selected to inquire into all public offenses committed or triable within their county, that upon the evidence presented to them the defendant is guilty. Such being the case, an indictment for a capital offense does of itself furnish a presumption of the guilt of the defendant too great to entitle him to bail as a matter of right under the constitution, or as a matter of discretion under the legislation of the state. It creates a presumption of guilt for all purposes except the trial before a petit jury. Indeed, if it did not create such presumption, the defendant held under it, or by virtue of the warrant based upon it, without other evidence of his guilt, would be entitled to his discharge absolutely. If it furnished no such presumption, it would not justify the exaction of bail or the detention of the defendant.

The authorities concur in sustaining these views. Thus, in the case of *State v. Mills*, 2 Dev. L. 421, the supreme court of North Carolina says: "After bill found, a defendant is presumed to be guilty to most if not to all purposes, except that of a fair and impartial trial before a petit jury. This presump-

tion is so strong that in the case of a capital felony, the party cannot be let to bail." And in *Hight v. United States*, 1 Morris, 410 [43 Am. Dec. 111], the supreme court of Iowa says: "An indictment furnishes no presumption of guilt against a prisoner when he is upon his trial, but so far as it regards all intermediate proceedings between the indictment and trial, it furnishes the very strongest possible presumption of guilt, if the grand jury is the appropriate organ of the law to decide in the first instance upon the guilt or innocence of the accused, and their finding of a true bill is conclusive so far as to put him upon his trial and to control all the intermediate proceedings. It is then *functus officio*, and raises no further presumption."

2. The indictment thus creating a great presumption of guilt against the defendants, the important questions arise, whether the finding of the grand jury can be reviewed on the application for bail, or its effect in creating such presumption be repelled by affidavits or oral testimony as to their guilt or innocence.

The doctrine of the adjudged cases, both in England and the United States, is, that in capital cases, on the application for bail, no inquiry can be had as to the evidence taken before the grand jury, as the deliberations of that body are secret, and the law does not permit the testimony received by them to be disclosed. Indeed, upon such application, the rule in England is to limit the examination as to the defendant's guilt or innocence to the depositions and proofs upon which he was committed: 1 Chitty's Crim. L. 129; *People v. McLeod*, 1 Hill (N. Y.), 394 [37 Am. Dec. 328]. In *Lord Mohun's Case*, 1 Salk. 104, the court says: "If a man be found guilty of murder by the coroner's inquest, we sometimes bail him, because the coroner proceeds upon depositions taken in writing, which we may look into; otherwise, if a man be found guilty of murder by a grand jury; because the court cannot take notice of their evidence, which they by their oath are bound to conceal." And Chitty, in his treatise on criminal law, says: "A man charged with murder by the verdict of the coroner's inquest may be admitted to bail, . . . though not after the finding of an indictment by the grand jury; the reason of which distinction may be, that in the first case the courts have the depositions to examine; whereas, in the latter case, the evidence is secret, and does not admit of a summary revision": 1 Chitty's Crim. L. 130. The same view with reference to the evidence upon which an indictment is found would seem to be

followed by the supreme court of Louisiana, in the case of *Territory v. Benoit*, 1 Mart. 142. The report of that case is very imperfect, but from the opinion we infer that reference on the motion was made to the testimony before the grand jury. The indictment was for a capital offense, and the motion was to have the defendant bailed; but the court said: "It cannot be done; bail is never allowed in offenses punishable by death, when the proof is evident or the presumption great. On a coroner's inquest finding a person guilty of a capital crime, the judges have often looked into the testimony, which the coroner is bound to record, and when they have been of opinion that the jurors had drawn an illogical conclusion, admitted the party to bail. But as the evidence before the grand jury is not written, and cannot be disclosed, the same discretion and control cannot be exercised, and the judges cannot help considering the finding of the grand jury as too great a presumption of the defendant's guilt to bail him. We recollect no case in which it was done."

The statute of this state, in regulating the proceedings before grand juries, makes no provision for the preservation of the testimony which may be taken before them. And though it does not in express terms prohibit the disclosure of the testimony taken, it does so impliedly. It designates the cases in which a grand jury may be required to disclose the testimony of a witness (sec. 218); and thus in effect declares that such disclosure shall not be required in any other cases. And there are evident reasons of public policy forbidding the disclosure, except in the enumerated cases. The testimony cannot, therefore, be received, if offered, and as a consequence, the finding of the grand jury by the indictment cannot be the subject of review upon the application for bail.

Can affidavits or oral testimony as to the guilt or innocence of the defendants be received to repel the presumption arising from the indictment? We are clearly of the opinion that they cannot be received, unless special and extraordinary circumstances exist, and there are no such circumstances shown in the present case. To permit such a procedure in ordinary cases, where no such circumstances exist, would result in rendering the application for bail, in the majority of cases, in effect a trial upon the merits. If such evidence were admissible on the part of the defendant, the public prosecutor could justly claim a right to controvert it; and thus counter-affidavits or conflicting oral testimony would be presented, "trans-

forming," as is justly observed by the supreme court of New York, in *People v. Hyler*, 2 Park. Cr. 571, "a motion to bail into an examination into the guilt or innocence of the prisoner." "The rule," continues the court in that case, "seems to be well settled to the contrary, and with reason, because to open the whole question of guilt or innocence to proof on a motion to admit to bail would be attended with most serious inconvenience."

The rule precluding evidence of the character we have designated, unless special and extraordinary circumstances exist in the case, upon an application for bail after indictment for a capital offense, prevails in the courts of nearly every state. It is also the rule of the federal courts. In the case of *United States v. Aaron Burr*, the defendant, having been indicted for treason, applied to be admitted to bail, and in the course of the discussion which followed, inquired "whether the court would go into testimony extrinsic to the indictment," without stating the existence of any special and extraordinary circumstances for the proceeding; and Mr. Chief Justice Marshall replied "that he had never known a case similar to the present, where such an examination had taken place." And though the chief justice added that he only stated his present impressions, and that the subject was open for argument afterwards, the application for bail was never renewed, as it undoubtedly would have been if Colonel Burr or his very able counsel could have supported by authority the admissibility of such extrinsic evidence in that case: 1 Burr's Trial, 312. So in the case of *United States v. Jones*, 3 Wash. C. C. 224, the defendants were indicted for piracy, and a motion to admit them to bail having been made, counsel proposed, with reference to one of them, to go into the evidence against him, but the court said: "The bill of indictment being found, we do not feel ourselves at liberty to inquire into the evidence against him."

The cases in which this rule has been departed from have only arisen, so far as we have been able to make an examination, in the courts of Texas, Indiana, and South Carolina. In Texas, previous to her annexation to the Union, it was held, in the case of *Republic v. Wingate* [not reported], that after an indictment for murder, the prisoner was entitled to an examination of the witnesses as to his guilt or innocence, upon an application for bail. We have not been able to find any report of this case, and standing by itself is not entitled to much considera-



tion against the general current of adjudications opposed to its conclusions. The cases decided in that state since her annexation are not authority, as the matter is now determined by a provision in her constitution. The ninth section of her bill of rights declares that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great; but this provision shall not be so construed as to prohibit bail after indictment found, upon an examination of the evidence by a judge of the supreme or district court, upon the return of the writ of *habeas corpus*, returnable in the county where the offense is committed": See *Yarbrough v. State*, 2 Tex. 523.

In Indiana the supreme court held that the statute of the state authorized, on application for bail, an examination of witnesses and a full investigation of the case. The court also held that, as under an indictment for murder in the first degree, the accused might be convicted of murder in the first or in the second degree, or manslaughter, it should not be taken as conclusive of the grade of offense in determining the question of bail: *Lumm v. State*, 3 Ind. 294. As to the first ground, it is sufficient to say that we have no such statute in this state; and as to the second ground, it does not strike us as possessing any force. Though it is true, under an indictment for murder in the first degree the accused may be convicted of a less offense, the grand jury have no right to present, and we are not to presume that they have presented, an indictment of that character, unless the evidence before them, unexplained or uncontradicted, would warrant in their judgment a conviction of the offense in that degree. The indictment is their finding that of the offense designated, in its character and degree, the defendant is guilty. And we agree with Mr. Justice Sutherland, in *Ex parte Tayloe*, 5 Cow. 56, "that an indictment must be taken as conclusive upon the degree of the crime" on the application for bail.

In South Carolina, in the case of *State v. Hill*, 1 Treadw. Const. 242, where the defendant was under indictment for a capital offense, it was held that affidavits tending to show that the prosecution was instituted from malice or mistake, and that the inveigling of the slave from his master, which constituted the offense charged, was not felonious or fraudulent; but in consequence of a fair claim of property, should be received and considered on the application of the defendant to be admitted to bail. This decision was made by a divided



court, and though supported to some extent by the action of the king's bench in *Mrs. Barney's Case*, 5 Mod. 323, is, like the decision cited from the supreme court of Texas, entitled to little weight against the general current of the authorities. And it is not easy to uphold it by any solid reasons. It is difficult to perceive how malice in the institution of the prosecution can affect the case. The accused is not entitled to any more leniency or consideration because improper motives may have led to the exposure of his crime and to proceedings against him. The malice on the part of the complainant is not likely to be infused into the public prosecutor or the grand jurors, so as to affect and control the conduct of the prosecution or the finding of the indictment. Where a mistake in the institution of the prosecution is alleged, the proper course is to make a representation of the matter to the public prosecutor, who will undoubtedly consent to the reception of bail, if satisfied of the truth of the representation. On the other hand, if the allegation be controverted, evidence as to the matter is evidence as to the guilt or innocence of the accused, which cannot be heard on an application for bail, for the reasons we have already stated, except where there are special and extraordinary circumstances. But if malice or mistake in the institution of a prosecution did constitute a circumstance sufficiently great to justify a departure from the ordinary rule, it would not help the defendants in the present case. Here no such malice or mistake is alleged.

What circumstances will be deemed of a special and extraordinary character, so as to justify, on the application for bail, the consideration of evidence offered against the presumption of guilt created by the indictment, it may be difficult to designate in general terms. It will suffice for the illustration of the views we entertain on this subject to mention some instances of the kind. The existence, at the time the indictment was found, of great popular excitement with reference to the prisoner, or the offense charged against him, likely to bias and warp the judgment of the grand jurors, would constitute such special and extraordinary circumstance. On this ground, the admission of testimony by a former chief justice of this court, in favor of Robinson, indicted for murder alleged to have been committed during the riots of 1850 at Sacramento, on his application for bail, may be justified. Strong feeling, it is said, was manifested against him by some of the grand jurors by whom it was indicted. And whilst the indictment

was still pending, he was elected a member of the legislature by the citizens of the county. The existence of the party charged to have been murdered would constitute an extraordinary circumstance in any case; and the allegation under oath of his existence in the application for bail would justify, if not require, a careful examination of the evidence offered. So, too, would a clear confession by another of the commission of the offense for which the defendant is indicted.

Bail may also be taken after indictment found, where no such special and extraordinary circumstances exist as we have mentioned. Thus it may be taken upon the admission of the public prosecutor that the evidence which he can produce will not warrant a conviction of a capital offense, or upon his admission of facts from which it is evident no such conviction can take place. So bail may be taken where, upon trial, the evidence for the prosecution and defense has been produced, and there has been a disagreement among the jurors; or where, after verdict, a new trial has been granted for the insufficiency of the evidence to warrant a conviction. Cases of this kind justify the allowance of bail in the discretion of the court, without hearing other evidence as to the guilt or innocence of the accused.

And independently of any consideration of the merits of the prosecution, circumstances frequently arise which will justify the allowance of bail after indictment found. Thus bail may be allowed if the trial of the prisoner has been unreasonably delayed. And under our statute, if the trial be postponed, even upon sufficient reasons, from term to term, the court may discharge the defendant on his own recognizance or on bail: Criminal Practice Act, secs. 594, 595. So, also, bail may be allowed where any event has happened postponing indefinitely the further prosecution of the action, as the repeal of the statute giving the jurisdiction of the court to try the indictment (where such jurisdiction depends upon statute), without provision for its transfer to any other tribunal. So, also, where the law creating the offense charged has been repealed without a reservation of the penalty for past offenses.

Other cases might be enumerated where bail, after indictment for a capital offense, may be properly asked and allowed. Those to which we have referred are of the most frequent occurrence. In the present case, there are no special and extraordinary circumstances stated which would justify us in listening to the evidence offered. The affidavits only show

that strong rebutting testimony against the prosecution may be presented to the trial jury, and this, by itself, disconnected from the circumstances we have designated, cannot be received against the indictment on this application.

Application for bail denied.

COPE, J., concurred.

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**ADMISSION TO BAIL AFTER INDICTMENT FOR MURDER.** — Under the United States constitution, release on bail is allowed in all criminal cases as a matter of right, except where the punishment may be death, in which cases admission to bail is within the discretion of the court: See U. S. Const., Amend. VIII. In most of the states the limit as to bail is fixed by constitution or statute. The general rule seems to be that all persons are entitled to bail, as a matter of right, in all except capital cases where the guilt is evident or the presumption great. For a collection of the statutory provisions on this subject, see Stimson's American Statute Law, sec. 122; and see this rule declared in *Ex parte White*, 9 Ark. 222; *Ex parte Sutherland*, 56 Ind. 595; *Ready v. Commonwealth*, 9 Dana, 38; *Ullery v. Commonwealth*, 8 B. Mon. 3; *Territory v. Benoit*, 1 Mart. 142; *State v. Hartwell*, 35 Me. 129; *Yauer v. People*, 34 Mich. 290; *Ex parte Fortenberry*, 53 Miss. 428; *People v. Perry*, 8 Abb. Pr., N. S., 27; *Commonwealth v. Keeper of Prison*, 1 Ashm. 227; *Ex parte Foster*, 5 Tex. App. 625; *Ex parte Randon*, 12 Id. 145; *Ex parte Coldiron*, 15 Id. 464; *Thompson v. State*, 25 Tex. Supp. 395.

Murder in the first degree is in most states the only degree of homicide which is made a capital offense; and therefore, when the offense consists of any other degree of the crime bail will be allowed. In Washington Territory, by statute, the right to refuse bail is confined to cases of murder in the first degree. In Wisconsin, where capital punishment was abolished, all persons were held bailable, no matter what the offense: *In re Perry*, 19 Wis. 676.

There seems to be a conflict of decisions on the question whether bail should be allowed in murder cases after indictment by a grand jury. In *Shore v. State*, 6 Mo. 640, the question was raised but not decided. In Louisiana, it was held that the fact that a grand jury has filed an indictment for a capital offense is of itself sufficient proof of guilt to preclude any inquiry into the merits on *habeas corpus* or on application for bail: *State v. Brusle*, 34 La. Ann. 61; *State v. Brewster*, 35 Id. 605; but the court adds in the latter case, "except under special and extraordinary circumstances," and cites the principal case on this point. But in *People v. McLeod*, 37 Am. Dec. 328, a New York case, the court declines to make any such exception, holding that the indictment is conclusive evidence of guilt, for every purpose, except on the trial for the offense, and bases its reasoning on the ground that the court cannot look into the proceedings of the grand jury because they are made secret by law. To the same effect, see *Hight v. United States*, 43 Am. Dec. 111, and see also the note to *People v. McLeod*, *supra*. In *Ex parte White*, 9 Ark. 222, the court hold that an indictment does not raise such a presumption of guilt as will absolutely preclude the court from going behind the indictment and investigating the merits of the charge with a view to ascertaining whether the accused is entitled to bail, but that it does raise such a presumption against defendant as will deprive him of the privilege of *habeas corpus* as a matter of right; and that to entitle him to the writ, he must state facts in his petition under oath which will rebut the presumptions raised against him by the indictment.

In *Lynch v. People*, 38 Ill. 494, it is said that the mere fact that a grand jury has found an indictment for murder will not preclude the court from inquiring into the facts of the case, to ascertain whether the offense charged may not actually prove to be of such a grade as will entitle the prisoner to bail; but to obtain relief, a clear case must be made out. And in *Commonwealth v. Lemley*, 2 Pittsb. 362, the court held that a prisoner is entitled, after indictment found, to be admitted to bail, as a matter of right, where the evidence produced at a hearing on application for bail satisfies the judge that the offense was not capital; and it is held in *Lumm v. State*, 3 Ind. 293, that the prisoner may sue out a writ of *habeas corpus*, and on the hearing prove such fact. Thus in *Ex parte Wolff*, 57 Cal. 94, where the prisoner had been indicted for murder, he sued out a writ of *habeas corpus*, and on the hearing proved that death of the person whom he was accused of murdering had resulted from his, the prisoner's, acts in assisting deceased to procure an abortion, and there being no evidence of intent to kill, the court ordered that he should be admitted to bail. So in *Ex parte Hock*, 68 Ind. 206, the evidence showed absence of intent to kill, the killing having been the result of a sudden combat, entered into in the heat of passion, and on the moment, without any previous acquaintance with the deceased, and the court ordered the prisoner to be admitted to bail. To the same effect, see *State v. Wicks*, R. M. Charl. 139, and *People v. Van Horne*, 8 Barb. 158, the latter being a case where the prisoner was admitted to bail on a showing that two out of three grand juries had held the crime to be only manslaughter, and that the third and last had held that it was murder. But it was held no ground for admission to bail that the prisoner had killed the deceased in a duel; that the duel was a fair one, and that both parties were foreigners, and did not know that the law regarded killing in a duel as murder: *Re v. Baronet*, Dears. C. C. 51; S. C., 1 El. & Bl. 1.

In *People v. Shattuck*, 6 Abb. N. C. 33, the court lay down the rule that on an application for bail after indictment for murder, the court will not look beyond the minutes of the grand jury, and that if it appears therefrom that the grand jury was not indifferent as to the guilt or innocence of the prisoner, that he will not be let to bail. In *People v. Godwin*, 5 C. H. Rec. 11, on this point, it is held that the prisoner may present to the court either affidavits or some matter arising from the testimony on which the charge was founded, as the basis of his application for bail; and in *State v. Hill*, 3 Brev. 89, the court heard and considered affidavits tending to show that the prosecution was instituted from malice or mistake. But in *State v. Drew*, 1 Taylor, 142, it was held that one indicted for murder cannot be bailed on affidavits taken *ex parte* by a person unauthorized to take them.

The burden of proof is on the defendant to show that guilt is not evident and that presumption is not strong, as an indictment implies *prima facie* that no right to bail exists: *Ex parte Kendall*, 100 Ind. 599; and in order to show this, he must produce the evidence on which the state intends to rely for conviction: *Ex parte Heffren*, 27 Id. 87; but he need not affirmatively prove his innocence by other evidence, and he is entitled to bail, unless the evidence, as a whole, satisfies the court that his guilt is evident: *Ex parte Randon*, 12 Tex. App. 145.

If there be no reasonable doubt of the prisoner's guilt, he ought not to be bailed: *Ex parte Tayloe*, 5 Cow. 39; so where there are strong doubts of defendant's innocence: *State v. McNab*, 20 N. H. 160; *State v. Rockafellow*, 6 N. J. L. 332; *People v. Shattuck*, 6 Abb. N. C. 33; but it is said in *Ex parte Bridewell*, 57 Miss. 39, that bail will be taken in a capital case, where there is a well-founded doubt of guilt. Where on *habeas corpus*, after indictment

for murder, it was shown that there were nineteen necessary witnesses, and only seven of them were examined, but from those examined there failed to appear any circumstances criminating the defendant, it was held that he should have been admitted to bail: *Ex parte Floyd*, 60 Miss. 913.

A safe rule on applications for bail, it is said in *Commonwealth v. Keeper of Prison*, 2 Ashm. 227, is to refuse bail in all cases where a judge would sustain a capital conviction, if pronounced by a jury on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail, and in instances where the evidence for the commonwealth is of less efficacy, to admit to bail. To the same effect, see *In re Foster*, 5 Tex. App. 625; *Ex parte Beacom*, 12 Id. 318. Except when the guilt is evident or presumption great, bail will not be refused when evidence is entirely circumstantial, unless it excludes, to a moral certainty, every reasonable hypothesis but that of the prisoner's guilt: *Ex parte Acree*, 63 Ala. 234. Where the evidence is conflicting on material points, bail will be refused: *Ex parte Beacom*, 12 Tex. App. 318. In *Ex parte Randon*, 12 Id. 146, where the evidence showed a murder, but not that the deceased was the man for whose murder defendant was indicted, nor that the defendant was connected with the homicide, it was held that he should be admitted to bail.

It is a good case for admission to bail after indictment for murder that the defendant has a present, painful, severe, and dangerous disease, caused by imprisonment, and likely to be aggravated by a continuance thereof: *Semmes's Case*, 11 Leigh, 665; *People v. Cole*, 6 Park. Cr. 695.

In some states, by statute and otherwise, it has become a rule that the prisoner will be admitted to bail though indicted for murder unless he is brought to trial within a specified time, as at the next stated term: *Ex parte Simonton*, 9 Port. 390; *Ex parte Stiff*, 18 Ala. 464; *Ex parte Croom*, 19 Id. 561; or within two terms: *Ex parte Carroll*, 36 Id. 600; but in *State v. Abbott*, R. M. Charl. 244, it is held that this is no ground for admission to bail, unless the continuance will or has operated oppressively; and in *Rez v. Andrews*, 2 Dowl. & L. 10, S. C., 1 New Cas. 199, the court refused to consider the postponement on account of absence of the witnesses for the prosecution as a ground for admission to bail.

Failure of a trial jury to agree is a proper fact to be shown on application for bail pending a motion for a new trial: *People v. Cole*, 6 Park. Cr. 695. In *People v. Perry*, where a prisoner was twice tried for murder, and on both occasions the jury failed to agree, the defendant was admitted to bail. It was stated in *Ohio v. Summons*, 19 Ohio, 139, that the rule in such cases is that if after trial and disagreement, on application for bail, the evidence is so weak that it would not sustain a verdict of guilty against a motion for a new trial, the court should admit the prisoner to bail. In *Beall v. State*, 39 Miss. 715, however, it was held that a court may admit a defendant to bail in such a case, even though on the evidence the jury ought to have rendered a verdict of guilty. But it does not follow that courts will, as a matter of course, admit to bail because the jury have failed to agree: *State v. Summons*, 19 Ohio, 139; *Webb v. State*, 4 Tex. App. 167.

After conviction and motion for a new trial, the prisoner certainly is no longer bailable: *State v. Connor*, 2 Bay, 34.

Refusal of a court to hear evidence on application for bail, after indictment for murder, is not such a final judgment as is reviewable in Illinois on appeal: *Lynch v. State*, 38 Ill. 494; though in Indiana the contrary is the rule: *Lumm v. State*, 3 Ind. 293; and the evidence will be considered on the appeal: *Ex parte Hefren*, 27 Id. 88; *Ex parte Kendall*, 100 Id. 599; and will be weighed without regard to the finding of the court below: *Ex parte Sutherland*, 56 Id. 595.

## LOGAN v. DRISCOLL.

[19 CALIFORNIA, 623.]

**OWNER OF LOWER MINING CLAIM UPON WHICH REFUSE MATTER HAS BEEN AND IS BEING WASHED** from a higher claim is entitled to damages for the injury sustained, and to an injunction to restrain the upper proprietor from continuing such acts, where it appears that plaintiff had first located his claim, and that the flow of such refuse matter interfered with and defeated the object for which plaintiff's claim was located and taken possession of. The rule, *Qui prior est in tempore potior est in jure*, applies in such cases; and the position that so long as the use made by defendant of his claims is not in itself unlawful, plaintiff cannot complain of its effect upon him, is untenable because no use is lawful which precludes plaintiff from the enjoyment of his rights.

**ACTION** to recover damages for injuries to plaintiffs' mining claim, and for a perpetual injunction to restrain further injury. The opinion states the facts.

*McConnell and Garber*, for the appellants.

*Sargent and Niles, and George Cadwallader*, for the respondents.

By Court, COPE, J. The plaintiffs are the owners of mining claims located in the bed of a creek, and the defendants own claims situated on a hill in the vicinity. The refuse matter washed from the claims of the defendants is deposited upon the claims of the plaintiffs to such an extent as to render the working of them impracticable. The claims of the plaintiffs were first located, and the action is for damages, and for a perpetual injunction.

The case was tried by a jury, and the errors assigned relate to the action of the court in giving and refusing instructions. The court proceeded in conformity with the maxim, *Qui prior est in tempore potior est in jure*, and there is no doubt that the case is a proper one for the application of this principle. The claims of the plaintiffs are valuable only for the gold which they contain, and the enjoyment of them lies in the use necessary to obtain possession of this gold. To interrupt the use of them for that purpose is to take away the opportunity to enjoy, and to defeat the object for which they were located and taken possession of. That this cannot legally be done is indisputable, and it is to us a matter of surprise that a contrary view should have been made the basis of an appeal to this court.

If the rule, *Qui prior est in tempore*, etc., were not applicable



in such cases, persons engaged in mining operations would hold their rights simply at the pleasure of others, and the idea of legal protection would be absurd. The defendants contend that so long as the use made of their claims is not in itself unlawful, its effect upon the plaintiffs cannot be regarded as a cause of complaint. But this position is in conflict with the maxim, *Sic utere tuo ut alienum non lædas*, and we are not aware of any principle upon which it can be maintained. The defendants are entitled to use their claims in a lawful manner, but no use can be considered lawful which precludes the plaintiffs from the enjoyment of their rights. This being the effect of the operations of the defendants, it is clear that their acts cannot be defended on legal grounds. There is nothing in *Edmond v. Chew*, 15 Cal. 137, militating against these views.

Judgment affirmed.

FIELD, C. J., concurred.

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MAXIM, QUI PRIOR EST IN TEMPORE POTIOR EST IN JURE, applied: See *Fisher v. Knox*, 53 Am. Dec. 503, and note.

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## MAHONE v. MAHONE.

[19 CALIFORNIA, 626.]

“**HABITUAL INTEMPERANCE**,” WITHIN MEANING OF DIVORCE STATUTES, is not necessarily the habit of drinking intoxicating liquors to such excess as to render the party at all times incapable of attending to business; but if there be a habit of drinking to excess in such degree as to render the party incapable of attending to his business during the principal portion of the time usually devoted to business, it amounts to habitual intemperance.

“**EXTREME CRUELTY**,” WITHIN MEANING OF DIVORCE LAWS, need not be persistent and become a fixed habit, before relief and safety can be had by divorce, and in an action for divorce on this ground it is error for the court to charge that “the acts must be persistent and the cruelty must be so extreme in its nature that in itself it furnishes an apprehension that the continuance of the cohabitation would be attended with bodily harm to the wife.”

ACTION for divorce, on the ground of habitual intemperance and extreme cruelty. The acts of cruelty proven were, that defendant, the husband, was frequently harsh, cruel, tyrannical toward his wife; that he frequently, in the presence of others, called her a b—ch, a black b—ch, wh—e, squaw, and cursed her, and struck, shook, and choked her, leaving marks on her person which remained for weeks. These acts were

committed when defendant was intoxicated, but this, witnesses proved, was the case most of the time. The remaining facts appear in the opinion.

*Hyer*, for the appellant.

*Frank Hereford*, for the respondent.

By Court, NORTON, J. This is an action for a divorce, on the grounds of habitual intemperance and of extreme cruelty. On the trial, the court gave the following charge: "Habitual intemperance is not, as is claimed by the plaintiff, such customary use to excess of intoxicating liquors as shall render the habit permanent, and at times unfit one for business; but it must be such an addiction thereto as shall completely disqualify the party from attending to his business avocations." This charge was too stringent. The idea conveyed by it to the jury must have been that the habit of drinking to excess must be of such a character as to render a party at all times incapable of attending to business. This is not necessary. If there is a fixed habit of drinking to excess to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance,—although the person may at intervals be in a condition to attend to his business affairs.

As to the ground of extreme cruelty, the court, after stating that differences between husband and wife incident to human nature, occasioning temporary estrangements and strifes, and sometimes accompanied by violence, are not a sufficient ground for divorce, gave the following charge: "The acts must be persistent, and the cruelty must be so extreme in its nature that in itself it furnishes an apprehension that the continuance of the cohabitation would be attended with bodily harm to the wife." This charge, we think, also was too strong. Acts of cruelty such as are specified need not be persistent, need not become a fixed habit, before relief and safety can be had by a divorce.

Judgment reversed, and cause remanded for a new trial.

FIELD, C. J., and COPE, J., concurred.

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GROUND OF DIVORCE, GENERALLY: See extensive note to *Hamaker v. Hamaker*, 65 Am. Dec. 708 et seq., giving all the statutory grounds of divorce in the various states.

CRUELTY AS GROUND OF DIVORCE: See *Morris v. Morris*, 73 Am. Dec. 615, and the extensive note thereto on this subject 619-631. The court in *Cole v.*



*Cole*, 23 Iowa, 441, citing the principal case, say that it is not every fancied or real wrong which amounts to cruelty, such, for instance, as will temporarily render plaintiff's life unpleasant, or give momentary pain or temporary illness; but if the consequences are such as really affect plaintiff's health to its real and actual prejudice, the acts amount to legal cruelty within the divorce statutes.

THE PRINCIPAL CASE IS CITED in *Wheeler v. Wheeler*, 53 Iowa, 512, where the court, speaking of the rule laid down concerning what is habitual intemperance as a ground for divorce, says that the rule is correct in itself, but that it cannot be taken as the sole criterion from which to determine what is habitual intemperance; and the court further declares itself as not prepared to say that "if a person has a fixed habit of drinking intoxicating liquors to excess, is frequently drunk, and such is his normal condition during the night, and in hours not devoted to business," that his wife would not be entitled to a divorce.

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## SELDEN v. CASHMAN.

[20 CALIFORNIA, 56.]

**INSTRUCTION THAT MALICE OR GROSS NEGLECT OF PLAINTIFF'S RIGHTS has not been sufficiently established to allow jury to find exemplary damages, is proper, if such is the state of the evidence.**

**EXEMPLARY DAMAGES WILL NOT BE AWARDED IN ACTION FOR SEIZURE OF STOCK OF GOODS under execution issued upon a void judgment, where the defendants acted in the seizure under the advice of counsel, and it does not appear that they knew or suspected the invalidity of the judgment, and the seizure was made and proceeded with in the ordinary manner.**

**DAMAGES FOR SEIZURE OF GOODS OF FIRM UNDER EXECUTION ISSUED ON VOID JUDGMENT do not include loss of profits resulting from diminution of business, after the release of the goods from seizure.**

ACTION for damages for the injury sustained from the seizure of a stock of goods under an execution issued upon a void judgment. The action was instituted by Selden against Cashman, Sullivan, and the sheriff who made the levy. Cashman and Sullivan commenced an action for goods sold and delivered, against Moses Harris, S. Seigman, and "John Doe" Harris, doing business under the firm name of Harris and Seigman. The attorney for Cashman and Sullivan made an affidavit for publication of summons, in which, in stating the title of the cause, he inserted the name "William Harris" in place of "John Doe Harris," though by what authority does not appear. An order of publication was made on this affidavit, and the published summons was addressed to Moses Harris, S. Seigman, and William Harris. Some months before entry of judgment, Cashman ascertained that there was a firm doing business in Sacramento under the firm name of William Har-

ris & Co., composed of William Harris and E. C. Selden, the appellant. Thinking this Harris to be the person named in the publication affidavit of his attorney, he went to Sacramento to determine his responsibility, and there consulted an attorney, who informed him that under a judgment against William Harris, he was entitled to levy on the interest of that person in the firm of William Harris & Co. Cashman requested the attorney to look into the business standing of the firm, and ascertain if the money could be made. Three or four months afterwards, the attorney wrote to him to send up the execution. Thereupon Cashman had the judgment entered, and sent the execution to the sheriff of Sacramento. The judgment was entered against Moses Harris, S. Seigman, and William Harris, "sued under the name of John Doe Harris." The sheriff of Sacramento levied the execution on all the goods, wares, and merchandise of William Harris and Selden, the appellant, and closed their store. The property was held in custody for about a week, during which time the store was closed, and Harris's interest was then sold, and bought in for Harris and Selden for a nominal amount, though really of much value. Harris moved to set aside the judgment rendered against him, and upon a plain showing that he was not the person intended to be sued, and had no connection with the subject-matter, the motion was granted with the consent of the plaintiff's attorneys. Selden now brought action for damages accruing from the levy upon the firm property of himself and Harris, and its detention and sale, averring that he had sustained great loss in the injury done to his business and to his credit, the diminution of the profits of his trade during the existence of and subsequently to the levy; and averring also that the defendants were actuated by malice in making the levy, and made the same without having any reason to suppose that the judgment against William Harris was valid. The defendants justified under the judgment and execution, and averred that they acted in good faith, believing the judgment to be valid. The evidence was directed principally to the conduct of the defendants with respect to the property at and after the seizure, with an attempt to show malice on their part, and established, among other things, that Selden was refused permission to examine the books of the firm of William Harris & Co., and that the defendants refused all propositions on the part of Selden to permit the store to remain open, and the business to be continued upon the giving

of bonds by Selden, but insisted upon closing the store under the writ. It appeared that for the month after William Harris & Co. resumed, their business was only one fourth or one fifth of what it was before the levy, and that it did not finally recover until about nine months thereafter. The plaintiff offered evidence to show the probable difference between the profits of his business for the ten months after the levy, and the profits which would have been realized had the business not been interrupted by the levy. On objection that these damages were too remote, the court excluded the evidence, and the plaintiff excepted. The plaintiff proposed instructions upon the question of exemplary damages, all of which the court refused, and charged "that malice, or gross or willful disregard of plaintiff's rights, has not been sufficiently established to allow the jury to find vindictive or consequential damages." The court also charged that the jury could not estimate the profits that the plaintiff might have made but for the levy, for they were too remote, consequential, and doubtful. "What you can estimate," said the court, "is the direct damage to his business and goods resulting from their seizure and detention. You cannot estimate any damage by way of interest, as the value of the goods has not been proved; and it is merely because I believe that plaintiff has been injured and damaged more than the interest upon the value of his goods during their detention would amount to, that I now instruct you that he is entitled to recover the profits he would have made on sales during detention." To the refusal of the instructions requested, and to the instructions given, the plaintiff excepted. The jury found for the plaintiff three hundred dollars damages. The plaintiff moved for a new trial, and from the order denying the motion, and from the judgment appealed.

*J. W. Winans*, for the appellant.

*J. B. Harmon*, for the respondent.

By Court, COPE, J. There is nothing in the evidence in this case from which a jury would be authorized to infer that the trespass complained of was the result of malice. The action is for damages for the seizure of a stock of goods under an execution issued upon a void judgment; but the fact of the invalidity of the judgment is not sufficient to warrant the conclusion that the seizure was malicious. The defendants acted in the matter upon the advice of counsel, and there is no reason for supposing that they either knew or suspected that

the judgment was invalid. There was nothing extraordinary in the circumstances attending the seizure, and the course ordinarily adopted in such cases seems to have been substantially pursued. The seizure was undoubtedly a hardship upon the plaintiff; but there is no evidence of any wrongful design or willful misconduct tending to aggravate the offense. The case presented is that of a simple trespass, and the court below acted properly in refusing to allow exemplary damages.

This view of the case disposes of the principal points argued in the briefs of counsel; and we think that none of the errors assigned are sufficient to justify a reversal. The trial seems to have been conducted in the most favorable manner possible for the plaintiff, though the amount recovered is probably a very inadequate compensation for the injury sustained. The hardships of the case, however, are not to be considered; and the right of recovery is necessarily limited to such damages as are susceptible of computation. The damages claimed on account of the loss of profits are not of this description, and the introduction of evidence upon the subject could only have resulted in confusion and embarrassment. It is impossible to administer exact justice in cases of this character; and the effort to do so would terminate in conclusions founded to a great extent upon speculation and conjecture.

Judgment affirmed.

FIELD, C. J., concurred.

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LOSS OF PROFITS AS DAMAGES: See *Hoy v. Grenoble*, 75 Am. Dec. 628, and note 631. Speculative profits are too remote: *Abbott v. Gatch*, 71 Id. 635, note 645; *Griffin v. Colver*, 69 Id. 718, note 725 et seq.

EXEMPLARY DAMAGES WHEN ALLOWED: See *Porter v. Seiler*, 62 Am. Dec. 341, and note 347; note to *Hagan v. Providence etc. R. R. Co.*, Id. 379; note to *Austin v. Wilson*, 50 Id. 767, 768; for malicious trespass by officer: Id. 768. A sheriff ought not to be liable in vindictive damages for seizing the property of a stranger to the writ where he has great difficulty in ascertaining the title to the property seized: *Duperrion v. Van Wickle*, 39 Id. 509.

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## ZOTTMAN v. SAN FRANCISCO.

[20 CALIFORNIA, 96.]

CHARTER IS SOURCE OF ALL POWER OF MUNICIPAL CORPORATION; and where the mode in which its power on any given subject can be exercised is prescribed by the charter, the mode must be followed or the corporation will not be bound.

CONTRACT MADE BY COMMON COUNCIL OF CITY IN DISREGARD OF CHARTER PROVISIONS cannot be the ground of any claim against the city.

**DIRECTIONS GIVEN OR CONTRACTS MADE CONCERNING IMPROVEMENT OF CITY PROPERTY BY INDIVIDUAL MEMBERS OF CITY COUNCIL**, in whom no power in this respect is vested by the city charter, have no greater validity than like directions given and like contracts made by any other residents of the city assuming to act for the corporation; nor can they by any subsequent approval or conduct impart validity to an otherwise invalid contract on this subject.

**CONTRACT OF MUNICIPAL CORPORATION NOT MADE IN MODE PRESCRIBED BY CHARTER** cannot be ratified and made obligatory in disregard of that mode by any subsequent action of the corporate authorities.

**RATIFICATION IS EQUIVALENT TO PREVIOUS AUTHORITY**, and operates upon the contract in the same manner as though the authority to make the contract had existed originally.

**POWER TO RATIFY NECESSARILY SUPPOSES POWER TO MAKE CONTRACT IN FIRST INSTANCE**; and a power to ratify in a given mode supposes the power to contract in the same way.

**WHERE CHARTER OF CITY AUTHORIZES CONTRACT FOR WORK TO BE GIVEN ONLY TO LOWEST BIDDER**, after notice of the contemplated work in the public journals, a contract made in any other way—that is, given to any other person than such lowest bidder—cannot be subsequently affirmed; for the corporate authorities cannot do retroactively what they are prohibited from doing originally.

**MUNICIPAL CORPORATION DOES NOT BECOME LIABLE, ON GROUND OF IMPLIED CONTRACT** to pay for benefits received, for the value of improvements made without any contract having been made therefor in the manner prescribed by the charter; for the law never implies an agreement against its own restrictions and prohibitions; it never implies an obligation to do that which it forbids the party to agree to do.

**TO CONSTITUTE LIABILITY ON IMPLIED CONTRACT, WHERE WORK IS PERFORMED BY ONE** the benefit of which is received by another, there must not only be no restrictions imposed by law upon the party sought to be charged against making in express terms a similar contract to that which is implied; but the party must also be in a situation where he is entirely free to elect whether he will or will not accept of the work, and where such election will or may influence the conduct of the other party with reference to the work itself.

**MERE RETENTION AND USE OF BENEFIT RESULTING FROM WORK**, where the party is not free to elect whether or not to accept the work, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment.

**ACTION** by Henry Zottman against the city and county of San Francisco. The opinion states the case.

*Waller and Moore*, for the appellant.

*H. H. Haight*, for the respondent.

By Court, FIELD, C. J. In May, 1854, the city of San Francisco, then a municipal corporation, entered into a contract with Nutting and Zottman for the improvement of certain public grounds of the city, known as Portsmouth Square, in

accordance with certain plans and specifications, the work to be performed by the contractors under the supervision of a superintendent, to be selected by the common council of the city, and to be completed to the satisfaction of a special committee, to be appointed by the common council, by the 12th of September following. A portion of the work designated in the contract consisted in the construction of an iron fence around the square. The contract was made in pursuance of an ordinance of the city, and no question is raised as to its validity. After it was made, the special committee and the superintendent appointed by the common council, upon examination of the plans and specifications, came to the conclusion that to render the work more durable than originally intended, there ought to be a stone base to the fence, instead of the one of wood named in the contract. They also discovered that no provision was made for painting the iron of the fence, without which, as stated by one of the witnesses, it would have immediately rusted, from the damp weather of the season, and the fence have become of little value to the city, either for ornament or use. The superintendent and special committee, under these circumstances, in presence of the city attorney, the president of the board of aldermen, and of different members of the board, ordered the contractors to perform the extra work mentioned,—that is, to construct a stone base, in the place of one of wood, and to paint the iron of the fence; and assured them that the city would pay them therefor. In conformity with this order, the extra work was performed, the contractors furnishing the necessary materials. And the testimony in the case shows that during its progress all the members of the common council must have been aware of the order to the contractors, as the work was in full view from the windows of the council chambers, and was the subject of general conversation and approval by the members at their various sessions and elsewhere, and no opposition to it was ever expressed by any member. One of the witnesses produced by the plaintiff states that the fence constructed was accepted by the city, and the amount of the original contract allowed; but the record immediately adds, that it was not shown that there was any action on the subject in either board of the common council. The statement is therefore to be regarded only as an inference of the witness from the separate approval of the individual members of the council, and not as establishing the fact of acceptance of the extra work by the corporation.

If the original contract price was in truth allowed by the city, that circumstance by itself only shows a waiver of any objection to the work by reason of its deviation from the original specifications. It does not prove any acceptance or approval of the extra work as such. A separate bill for the extra work, including the materials furnished in its execution, was presented by the contractors to the special committee, but it does not appear from the record that the bill was ever presented to the common council, or was ever the subject of consideration by either board. It is for the amount of this bill that the present action is brought, Nutting having assigned his interest in the demand to his co-contractor, the plaintiff, and the liabilities of the city of San Francisco having been cast by the consolidation act upon the defendants. The court below gave judgment of nonsuit against the plaintiff, on the ground that there was no evidence of any ordinance of the common council of the city authorizing the extra work; and from this judgment the appeal is taken.

It is not pretended that the superintendent or special committee had any authority to enter into any contract on behalf of the city. Their powers were limited to the execution of the original contract, and did not embrace the making of a new or different one. But it is contended in substance: 1. That as the employment of the contractors to perform the extra work, which included the furnishing of the necessary materials, was known to the individual members of the common council, and was approved by them, and adoption and ratification of the employment by the corporation are to be presumed; and 2. That the corporation has received the benefit of the extra work of the contractors, and is in consequence liable to them upon an implied contract. The positions of the learned counsel of the appellant are not stated in this form, but his argument is to that purport. If the positions thus stated cannot be maintained, his case must fail.

An examination of the clauses of the charter of the city then in force, with reference to improvements and to contracts for work, will show the untenable character of the first position. The charter was the source of all the power which could be exercised on the subject. Looking to that instrument, we find that it vested in the common council the legislative power of the city, and clothed them with exclusive authority over improvements of the city property, and prescribed the mode in which the authority should be exercised. It empowered the



council to pass "all proper and necessary laws" for such improvements (art. 3, sec. 13), and it required "every ordinance providing for any specific improvement" to be published after its passage by one board, and before its transmission to the other, with the ayes and noes, in some city paper (art. 3, sec. 4), and it declared that "all contracts for work" should be let to the lowest bidder, after notice given through the public journals: Art. 6, sec. 7. These provisions whilst conferring authority upon the common council, also fixed the bounds of their action. Beyond them they could not go, and give validity to their acts. They could, therefore, only provide for any specific improvement of the city property by the passage of a law—that is, an ordinance for that purpose. "Laws" and "ordinances," when applied to the acts of municipal corporations, are synonymous terms, and were so used in the charter: Art. 3, sec. 3. And to apprise the public of the improvement contemplated, and thus give an opportunity to suggest objections to the same, and to prevent improvident legislation on the subject, the clause was inserted in the charter requiring the publication of the ordinance for the improvement, after its passage by one board before its consideration by the other board. And even when the ordinance had become a law, to prevent favoritism or fraud on the part of the common council or the officers of the city, the provision was added for giving the contract to the lowest bidder after due notice in the public journals. A contract made in disregard of these stringent but wise provisions cannot be the ground of any claim against the city. Individual members of the common council were not invested by the charter with any power to improve the city property, and any directions given or contracts made by them upon the subject had the same and no greater validity than like directions given and like contracts made by any other residents of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct impart validity to such contract. But we go further than this; the common council even could not by any subsequent action give validity to a contract thus made. The mode in which alone they could bind the corporation by a contract for the improvement of city property was prescribed by the charter, and no validity could be given by them to a contract made in any other manner. The rule is general, and applies to the corporate authorities of all municipal bodies; where the mode in which their power on



any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the power. Thus, where authority is conferred to sell property, with a clause that the sale shall be made at public auction, the mode prescribed is essential to the validity of the sale; indeed, there is no power to sell in any other way. Aside from the mode designated, there is a want of all power on the subject. This is too obvious to require argument, and so are all the adjudications. Thus, in *Head v. Providence Insurance Company*, 2 Cranch, 156, Mr. Chief Justice Marshall, in speaking of bodies which have only a legal existence, says: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe the mode, or the instrument no more creates a contract than if the body had never been incorporated": See *McCracken v. City of San Francisco*, 16 Cal. 619; *Farmers' Loan and Trust Co. v. Carroll*, 5 Barb. 649; *New York Fire Insurance Co. v. Ely*, 5 Conn. 568 [13 Am. Dec. 100].

As a necessary consequence flowing from these views, a contract not made in the prescribed mode cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened upon the corporation. Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instance; and a power to ratify in a given mode supposes the power to contract in the same way. Therefore, where the charter of a city authorizes a sale of city property only at public auction, a sale not thus made is from its very nature incapable of ratification, because it could not have been otherwise made originally. So where the charter authorizes a contract for work to be given only to the lowest bidder, after notice of the contemplated work in the public journals, a contract made in any other way—that is, given to any other person than such lowest bidder—cannot be subsequently affirmed. Were this not so, the corporate authorities would be able to do retroactively what they are prohibited from doing originally. We had occasion, in the case of *McCracken v. City of San Francisco*, 16 Cal. 519, to give to this subject great consideration, and we there held that where authority to do a particular act can only be

exercised in a particular form or mode, the ratification must follow such form or mode, and that a ratification can only be made when the principal possesses at the time the power to do the act ratified. The doctrines there laid down we regard of vital importance for the protection of the interests of municipal corporations, and without an adherence to them, restrictions such as were embodied in the charter of San Francisco,—or at present are embodied in the consolidation act,—upon the corporate authorities, may be practically disregarded and defeated. Since that decision was rendered, we have had our attention called to the case of *Brady v. Mayor etc. of New York*, 16 How. Pr. 432, where these doctrines are affirmed in an opinion of great force, and applied to an alleged contract for work done upon a street in the city of New York. The alleged contract in that case was made by the street commissioner on behalf of the city, and was for the performance of work upon the street, in accordance with certain specifications, the stipulated price to be paid upon the confirmation of an assessment for the work by the common council.

The work was performed in accordance with the provisions of the contract, and seventy per cent of the contract price was paid, and an assessment for the entire price was made for the work and confirmed. The amendment of 1853 to the charter of that city requires that "all work to be done and all supplies to be furnished for the corporation, involving an expenditure of more than \$250, shall be by contract founded on sealed bids, or on proposals made in compliance with public notice for the full period of ten days; and all such contracts, when given, shall be given to the lowest bidder, with adequate security." In consequence of the manner in which the bids made upon the proposals for the work were tested, the lowest bidder could not be ascertained; it was therefore held that the contract was illegal and void. The question was then raised, whether, under the circumstances, the defendants were liable for the work done. And this question was discussed by the court in two aspects: whether they were liable to the plaintiff as upon a *quantum meruit*, because the work had been performed and accepted; and whether the common council had the power to waive the original defect in the plaintiff's claim, and by their action affirm his title to recover, so as to give him a right of action, notwithstanding the requirements of the charter had not been complied with. It is

under similar aspects that the question of the liability of the city of San Francisco presents itself in the present case. "The corporation," said the court, "can only act through its chosen officers and agents. If they not only may pay for work and labor actually done without a compliance with the statute requisites, but are legally bound to such payment, then no contract is necessary, and the restrictions in the statute are a dead letter. If they may dispense with a contract, then, and then only, can they confirm an illegal and void contract, and then, also, by any acceptance of the work and a confirmation of the contract by resolution, they repeal the statute *pro hac vice*. The relation which the corporation and its officers bear to the subject, the duties they owe to the public and those upon whom the burden is to fall, and the nature of the powers they possess, forbid us to concede any such force to their acts. By the charter, the power is limited, and it is a familiar rule that corporations can only bind themselves by contracts they are expressly or impliedly authorized to make.

"It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard.

"The analogy drawn from the obligation of an individual to pay for work which he accepts, although there has been no previous contract for its performance, wholly fails to reach the present case. Here, neither the officers of the corporation, nor the corporation by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the charter; and the law never implies an obligation to do that which it forbids the party to agree to do.

"And for the like reason the defendants cannot be treated as ratifying the unauthorized acts of its agents. The difficulty lies, not merely in the want of original power in the agents to make the contract, but in the want of power in the corporation itself to make the contract otherwise than in the mode prescribed by the charter. An individual having power

to make a contract may ratify or affirm it, when made by one who without authority assumes to be his agent; but if the individual have himself no such power, he can no more bind himself retroactively to its performance by affirmance or ratification than he could have done so prospectively in the first instance. The power to ratify *ex vi termini* implies a power to have made the contract, and the power to ratify in a particular mode implies the power to have made the contract in that manner."

2. The second position of the appellant, that the corporation has received the benefit of the extra work of the contractors, and is in consequence liable to them upon an implied contract, is as untenable as his first position. Indeed, the argument which meets the first position shows the unsoundness of the second. If the common council could not by any subsequent action affirm and ratify a contract originally made in disregard of the requirements of the charter, so as to fasten a liability upon the corporation, it is difficult to perceive how the benefit which may have resulted to the city in the improvement of her property, from the performance of the unauthorized and illegal contract, could create any such liability. We do not question the general doctrine, that where one receives the benefit of another's work he is bound to pay for the same, but we deny its application to the case like the present. The extra work for which the action is brought was performed without the request of the corporation; it could, therefore, of itself impose no obligation upon the corporation, any more than if the contractors had made any other improvements to the city property upon an unauthorized contract with individual members of the common council, or upon their own voluntary action, independent of any such contract. The extra work having been thus performed without request, the common council had no authority after it was performed to agree to pay what it was reasonably worth. There is, indeed, no evidence in the record that the extra work was ever considered by either board; but we do not rest our opinion upon the want of evidence as to the action of the common council on the subject, but upon their want of power. They could not, as we have already shown, from the restrictions imposed by the charter upon their powers, have made a valid contract in advance to pay the contractors the reasonable value of the extra work,—the charter requiring all contracts for the improvement of the city property to be given out to the lowest bidder, and of course at a fixed price, after

notice of the contemplated improvement in the public journals. What they thus had no authority to agree in advance to pay for the work, they had no authority to agree to pay after the work was completed. As in the case cited from New York, the difficulty existed in their want of power to bind the corporation for improvements of the city property, except in the mode prescribed by the charter. Outside of the prescribed mode, as we have stated, they were destitute of any power over the subject. As they had no authority to agree to such payment in express terms, the law could not imply any such agreement against the corporation. The law never implies an agreement against its own restrictions and prohibitions, or as it is expressed in the New York case, "the law never implies an obligation to do that which it forbids the party to agree to do."

To the application of the doctrine of liability upon an implied contract, where work is performed by one, the benefit of which is received by another, there must not only be no restrictions imposed by the law upon the party sought to be charged against making in direct terms a similar contract to that which is implied, but the party must also be in a situation where he is entirely free to elect whether he will or will not accept of the work, and where such election will or may influence the conduct of the other party with reference to the work itself. The mere retention and use of the benefit resulting from the work—where no such power or freedom of election exists, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment. Thus, if one person should erect a cottage or stable upon the land of another without request, the conduct of the architect could not be affected by a refusal of the owner of the land to accept the building. The architect could not, upon such refusal, remove the building, it having become attached to and a part of the freehold; nor would the owner of the land be deemed to have accepted the building merely because he had not chosen to tear it down, or had seen fit to use it in connection with his land. From the necessity of the case, the owner receives the benefit of the building by reason of his right in the soil, and not from any supposed acceptance, without subjecting himself to any obligation of payment. So, too, in the present case, from necessity the corporation received the benefit of the stone base to the iron fence around Portsmouth Square, and of the paint-

ing of the iron fence, without incurring any liability therefor. It never ordered the work or the painting. These were done without its request or authority. A declaration by resolution that it did not accept of the same, could not of itself have affected the conduct of the contractors. They could not have interfered with either base or paint if such declaration had been made. Nor was the corporation bound to remove the base and paint to avoid liability. So, too, where work is done upon the streets of the city without authority, liability does not follow because the streets may be improved thereby, or their use, as previously, may be continued. Such continued use constitutes no such evidence of acceptance as to create a liability against the corporation: *Bartholomew v. Jackson*, 20 Johns. 28 [11 Am. Dec. 237]; *Ellis v. Hamlen*, 3 Taunt. 52; *Smith v. Brady*, 17 N. Y. 173 [72 Am. Dec. 442].

The cases cited by the appellant from the decisions of this court, *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453, and *Argenti v. City of San Francisco*, 16 Id. 255, do not support his position. In the first case the decision was placed upon the pleadings, and is not authority upon any question arising in the case at bar. One of the justices did, it is true, discuss the case on its merits, and there are some expressions in his opinion which may be open to observation. The case on its merits was, indeed, a very strong one, and the decision might perhaps be supported upon the ground that the property of the plaintiff was appropriated to the necessary purposes of the city. It is unnecessary, however, to express any opinion upon this point, as the case itself is authority only upon a question of pleading. In the second case, the justices who pronounced the judgment concurred only in the conclusion. They differ entirely in the grounds upon which they rested the liability of the city; one of them holding that a municipal corporation could only act in the cases and in the mode prescribed by its charter, and that for street improvements of a local nature, express contracts authorized by ordinance were necessary to create a liability; and that the doctrine of liability, as upon implied contracts, had no application to cases of that character: *Argenti v. San Francisco*, 16 Cal. 282. It is sufficient, however, to observe that in consequence of the disagreement of the justices in their views, the decision is not authority upon any question presented in the present case.

Judgment affirmed.

COPE, J., delivered a concurring opinion.



MUNICIPAL CORPORATION CAN EXERCISE ONLY THOSE POWERS EXPRESSLY GRANTED BY CHARTER and necessarily incidental powers, and when the mode of executing a power granted is prescribed by the charter or statute granting it, the prescribed mode must be pursued, or the corporation will not be bound: See *Carron v. Martin*, 69 Am. Dec. 584, and note 589; and with respect to private corporations, see *Lewey's Island R. R. Co. v. Bolton*, 77 Id. 236; *Abby v. Billups*, 72 Id. 143, note 148. The principal case is cited to this effect in *Murphy v. Napa Co.*, 20 Cal. 502; *French v. Teschemaker*, 24 Id. 550, 552. The mode of execution in such cases constitutes the measure of the power: *Hervo v. San Francisco*, 33 Id. 145; *Nicolson Pavement Co. v. Painter*, 25 Id. 705; *McCoy v. Briant*, 53 Id. 250, citing the principal case. And in general, where a power is conferred by law, and the manner of its exercise is also prescribed, the power can be exercised only in the prescribed mode: *Iowa Railroad Land Co. v. County of Sac*, 39 Iowa, 149; *Sadler v. Eureka County*, 15 Nev. 44; *Ferguson v. Halsell*, 47 Tex. 423; *Flagstaff S. M. Co. v. Patrick*, 2 Utah, 316, citing the principal case. Therefore a public corporation is not bound by a contract for additions or changes upon the original work not made in accordance with the provisions of the law: *Sadler v. Eureka County*, *supra*, citing the principal case. And a party dealing in a matter expressly provided for in the charter is bound to see to it that the charter is complied with. If he choose to take the hazard or neglect this, he is a mere volunteer, and must suffer. An officer of a corporation has no power to make a contract, except in the manner pointed out by the statute from which the power is derived: *Murphy v. Louisville*, 9 Bush, 194; *Craycraft v. Selvage*, 10 Id. 707, citing the principal case. So where a corporation issues commercial paper, not apparently within the scope of its powers, such paper is void in the hands of a *bona fide* holder, if there can be such a holder: *Aurora v. West*, 22 Ind. 95, citing the principal case. In *Pixley v. Western Pacific R. R. Co.*, 33 Cal. 197, the principal case is distinguished, since in that case the charter of the corporation did not confine it to any particular mode in making contracts, and consequently the mode was not there the measure of the corporate power.

LIABILITY OF MUNICIPAL CORPORATIONS ON GROUND OF BENEFICIAL USE OF PROPERTY OR LABOR. — Counties: See note to *Gilman v. Contra Costa Co.*, 68 Am. Dec. 293, 294. The acceptance and occupancy of a public building by a county will not enable the contractor to recover of the county on a *quantum meruit* an amount in excess of that properly authorized, caused by changes and extensions of the original plan: *Richard v. Warren County*, 31 Iowa, 392. And where there exist legal restrictions which disable a corporation to agree in express terms to pay money, the law does not imply any such agreement against the corporation, though it has received a benefit: *Springfield Milling Co. v. Lane Co.*, 5 Or. 267. So the fact that bonds issued in excess of the constitutional limit are void, and that the corporation has received value for them, does not entitle the holder to recover the amount paid therefor from the corporation. The receipt of value for them does not create a debt on the part of the corporation: *McPherson v. Foster Bros.*, 43 Iowa, 71. The above cases cite the principal case. In *Cincinnati v. Cameron*, 33 Ohio St. 374, it is said, *per Wright, J.*, citing the principal case: "It is by no means true that because a corporation accepts and makes use of the work done that therefore it is estopped. The circumstances may be such that it cannot help itself. . . . The doctrine of estoppel only applies in those cases where the corporation may accept or reject with equal convenience. While, therefore, it might not be sufficient to base a recovery on the sole ground that the city had received the benefits, and therefore could not refuse the payment, the

other circumstances showing the justice of the plaintiff's claim are strengthened by the fact that he has given a *quid pro quo*."

RATIFICATION OF ACT MUST BE IN PARTICULAR MODE OR FORM necessary to confer an authority to perform it in the first instance: *Despatch Line v. Bellamy Mfg. Co.*, 37 Am. Dec. 203; *Spofford v. Hobbs*, 48 Id. 521.

RATIFICATION OF ACT IS EQUIVALENT TO PRECEDENT AUTHORITY: *Despatch Line v. Bellamy Mfg. Co.*, 37 Am. Dec. 203; *Clealand v. Walker*, 46 Id. 238.

RATIFICATION BY MUNICIPAL AUTHORITIES.—Having the power in the first instance to employ counsel, the commissioners had the power to ratify the unauthorized act of the district attorney in employing counsel to assist him, in *Clarke v. Lyon County*, 8 Nev. 188. A subsequent ratification by the municipal officers, within their powers and according to the method of contracting pointed out in the charter, binds the corporation as effectually as a contract in advance could do: *People v. Swift*, 31 Cal. 28.

NO IMPLIED CONTRACT TO PAY MERE VOLUNTEER: *Chadwick v. Knox*, 64 Am. Dec. 329. *Quantum meruit* or *quantum valebant* for partial or imperfect performance of contract: See *Coveta Falls Mfg. Co. v. Rogers*, 65 Id. 602, note 606.

## TOUCHARD v. CROW.

[20 CALIFORNIA, 150.]

WORD "SEAL," EMBRACED IN BRACKETS, AND APPEARING IN COPY OF INSTRUMENT embodied in record on appeal, imports that the proper seal is affixed to the original, unless objection is taken at the trial on this ground.

DEPUTY COUNTY CLERK HAS EQUAL AUTHORITY WITH COUNTY CLERK in respect to taking acknowledgments to conveyances.

WHERE COUNTY CLERK ACTS AS EX OFFICIO CLERK OF DIFFERENT COURTS, process or proceedings of such courts issued or attested by him are not invalid because of the absence of the designation of the particular court of which he acts as *ex officio* clerk, provided that fact otherwise sufficiently appears upon the face of the papers; and the affixing of a seal inscribed with the name of a court is sufficient for this purpose.

CERTIFICATE OF ACKNOWLEDGMENT TO DEED ATTESTED BY DEPUTY COUNTY CLERK, with seal of court affixed, is sufficient to authorize the record of the deed, under laws providing that the acknowledgment must be taken by the clerk of a court having a seal, and that the county clerk is *ex officio* clerk of all courts having a seal, except the supreme court.

CERTIFICATE OF ACKNOWLEDGMENT TO DEED IS TO BE SUSTAINED, IF POSSIBLE; and in support of it, reference may be had to the instrument to which it is attached.

OPERATIVE WORDS OF RELEASE IN SIMPLE QUITCLAIM DEED are "release, release, and quitclaim"; and where the words "bargain, sell, and quitclaim" are employed, they operate, not merely to release, but to transfer any interest which the grantor possessed at the execution of the deed.

UNITED STATES PATENT, FOLLOWING FINAL DECREE AFFIRMING VALIDITY OF MEXICAN GRANT, takes effect by relation at the date of the presentation of the petition for confirmation to the land commission, and is to be regarded, so far as all intermediate conveyances are concerned, as having been executed at that time.



**TENANT IN COMMON OF TRACT OF LAND IS ENTITLED TO POSSESSION OF, and may maintain ejectment for, the whole tract against all persons except his co-tenants.**

**IF COUNSEL, IN CASE TRIED BY COURT WITHOUT JURY, DESIRES TO PRESENT POINTS OF LAW, as applicable to the facts established, or sought to be established, upon which the court might be called to charge a jury, were there a jury in the case, the proper course is to present them in the form of propositions, preceding them with a statement that counsel makes the following points, or counsel contends as follows.**

**EJECTMENT by Touchard, executor, against Crow and others.**  
The opinion states the case.

*John Wilson, for the appellant.*

*George Cadwallader and H. P. Hepburn, for the respondent.*

By Court, FIELD, C. J. This is an action of ejectment to recover the possession of certain real estate situated in Sonoma County, constituting part of the tract known as the rancho of Roblar de la Miseria. The plaintiff claims under a patent of the United States, issued upon a confirmation of a Mexican grant, under the act of congress of March 3, 1851. The grant was made to Juan N. Padilla by Pio Pico, former governor of California, in November, 1845, and was approved by the departmental assembly in June, 1846. It is for four square leagues of land, and embraces the premises in controversy. On the 13th of June, 1849, the grantee conveyed the tract granted to Heyerman, and on the 30th of July, 1852, the latter, in connection with his wife, executed a conveyance of their interest to Stevens. This conveyance was acknowledged before the deputy clerk of the county of Sonoma on the day of its execution, and was recorded in the office of the recorder of the county on the 23d of August following. On the 2d of June, 1859, proof of the execution of the conveyance by Heyerman was made before a notary public, and on the 24th of April, 1860, the conveyance was again recorded in the same office. From Stevens, the plaintiff traced title to the premises in controversy by sundry mesne conveyances to Matthey, his testator.

On the 24th of February, 1852, Heyerman, in connection with eight other persons, filed a petition before the United States land commission for a confirmation of the claim under the grant to Padilla. The record before us does not disclose the manner in which the eight other petitioners acquired their interests, but as Heyerman, who had previously possessed the entire claim, united in the petition, it is to be presumed that

they acquired their interests through him; and that his subsequent conveyance to Stevens was only intended to pass his remaining interest. He would at least be estopped by his petition from denying that they were interested with him in the premises. The claim was confirmed to the petitioners by the land commission in February, 1853, and on appeal, by the United States district court in September, 1855. In November following, the United States having declined to prosecute an appeal to the supreme court, the petitioners had leave to proceed upon the decree of the district court as upon a final decree. Upon this decree, and the approved survey of the premises by the surveyor-general of the United States for California, the patent was issued. From the patentees the plaintiff traced title to the premises in controversy to his testator; from Heyerman, through the conveyance to Stevens which we have mentioned; and from the eight other patentees, through various mesne conveyances, execution sales, and probate proceedings.

The defendants also claim under the patent of the United States, and seek to connect themselves with it through a conveyance from Heyerman to Baylis, bearing date on the 21st of February, 1860, and recorded in the office of the recorder of Sonoma County on the 26th of April, 1860. By the conveyance to Stevens, the grantors, Heyerman and wife, bargain, sell, and quitclaim all their "right, title, interest, estate, claim, and demand, both at law and in equity, and as well in possession as in expectancy," in and to the tract, describing it as that piece of land situated in Sonoma County, known as the Rancho Roblar de la Miseria. By the conveyance to Baylis, the grantor, Heyerman, "grants, bargains, sells, and conveys" the tract, describing it in the same manner, with the additional designation that it was granted to Padilla in the year 1845, and by him conveyed to Heyerman on the 13th of June, 1849.

As it will be thus seen, the principal question between the parties relates to the operation and effect of these deeds from Heyerman. The appellants contend: 1. That the deed to Stevens was not acknowledged or proved, so as to entitle it to be recorded, and that in consequence its record did not impart any notice to them, and they are protected as *bona fide* purchasers without notice; 2. That the deed was only a quitclaim, and did not operate to pass the interest which vested in Heyerman from the confirmation of the grant and the patent of the United States; and 3. That the deed was only intended to

pass the interest of the grantors in one half of a league of the four leagues embraced by the grant.

1. The deed to Stevens, as we have stated, was acknowledged on the day of its execution, before the deputy clerk of Sonoma County. The certificate of the acknowledgment is in its form correct; it contains a statement of every particular required by the statute. Its concluding attestation clause is as follows: "Witness my hand and seal of court hereto affixed at office, this thirtieth day of July, A. D. 1852. John A. Brewster, deputy county clerk of Sonoma County"; and in the margin opposite this attestation the seal of the court is affixed. We must at least conclude that the seal is thus affixed, for the word "seal," embraced in brackets, appears in the copy of the certificate embodied in the record. If any other seal than that of the court, of which the officer was deputy clerk, is affixed to the original, that fact should have been made the ground of objection at the trial. No objection of the kind was taken, and we must therefore infer that no ground for any existed. The objection urged to the certificate is not to its form, or to the seal affixed, but to the authority of the officer to take the acknowledgment. If the county clerk himself could take it, his deputy could also take it, for the deputy is invested by statute with the same power in all respects which the principal possesses: Act Defining the Duties of County Clerks, of April 18, 1850, sec. 3; see also *Beaumont v. Yeatman*, 8 Humph. 542. The act concerning conveyances provides that "the proof or acknowledgment of conveyances may be taken within the state by the clerk of a court having a seal," and when thus taken, that the certificate shall be under his hand and the seal of the court. The questions for determination are whether the acknowledgment under consideration was taken before the deputy of an officer of this character, and whether the fact sufficiently appears from the certificate.

The county clerk is by the constitution *ex officio* clerk of the district court, and by statute he is also *ex officio* clerk of the county court, probate court, and court of sessions of his county: Const., art. 6, sec. 7; Act Defining the Duties of County Clerk, sec. 1; Prac. Act, sec. 644. The statute defining his duties speaks of the acts which he is authorized or required to perform as acts to be performed by him as county clerk. It says each county clerk may appoint one or more deputies; the county clerk may take from each of his deputies a bond for the faithful performance of his duties; the county clerk shall,

either in person or by deputy, attend each term of the county court, district court, probate court, and court of sessions held in his county; he shall issue all writs and process; he shall enter, under the directions of the court, all orders, judgments, and decrees proper to be entered, and the like. It would thus seem that he may issue process and attest proceedings of the courts of which he is *ex officio* clerk, over his signature as county clerk, and leave to the title of the proceedings, or the contents of the instruments, the identification of the court to which they belong. It is the usual practice for the clerk in such cases simply to append to his individual signature his character as clerk of the court, or his general character as county clerk, with the addition of his character as *ex officio* clerk of the particular court from which the process is issued, or in which the proceedings are taken. We have never heard the sufficiency of either of these modes of signing process or attesting proceedings questioned, nor could it be questioned successfully. This being the case, we do not perceive any principle upon which the process of proceedings should be held invalid by reason of the absence of the designation of the court of which the county clerk acts as *ex officio* clerk, provided that fact otherwise sufficiently appears upon the face of the papers. The county clerk is by law *ex officio* clerk of all the courts of the state having a seal, except of the supreme court. He is the keeper of the seals of those courts, the seals having inscribed upon them the name of the courts to which they belong. The affixing of the seal bearing the inscription mentioned does therefore sufficiently designate the court of which the county clerk in the particular matter acts as *ex officio* clerk. No one could be mistaken or misled by the omission of any further designation of the clerk's official connection with the court.

By the constitution, the county judge is required to perform the duties of surrogate or probate judge (art. 6, sec. 8); and by statute he is declared to be *ex officio* probate judge: Act to Regulate Settlement of the Estates of Deceased Persons, of May 1, 1851, sec. 1. Yet there is no uniformity in the manner in which the different county judges sign or attest the orders and proceedings in the settlement of estates before them. Sometimes they use their simple signatures, without any designation of their official character, and sometimes they add the designation "county judge," and sometimes "probate judge"; and has never been held or supposed that the validity of the

orders or proceedings was in any respect affected by the absence of the official designation from the signature, or the presence of the designation "county judge" instead of "probate judge." It has always been considered sufficient that the papers disclosed on their face the character in which the judge acted.

Looking, then, to the certificate of acknowledgment annexed to the deed to Stevens,—its attestation clause, the seal of the court affixed, the inscription which the seal bears,—and considering the law as to the *ex officio* character of the county clerk as clerk of all the courts in his county having a seal,—and the equal authority of his deputy,—we are of opinion that it does sufficiently appear that the acknowledgment was taken before an officer empowered to take it, and that the certificate authorized the record of the deed; and consequently that its record imparted constructive notice to subsequent purchasers from the same grantors.

We do not find any cases precisely similar to this, and therefore directly in point; but the general current of the authorities is that the certificate is to be sustained, if possible, and in support of it reference may be had to the instrument to which it is attached. Thus in *Brooks v. Chaplin*, 3 Vt. 281 [23 Am. Dec. 209], the certificate of the acknowledgment did not show in what state the acknowledgment was taken, and the omission was supplied by reference to the deed, in which the grantor described himself as a resident of "Suffield, in the county of Hartford, and state of Connecticut." The acknowledgment purported to be taken within two days after the execution of the deed in Hartford County, and the court said that it could intend no other than the same county of Hartford in which the deed was supposed to have been executed. "It is not indispensable," said the court, "that the place of taking should fully appear from the acknowledgment itself, provided it can be discovered with sufficient certainty by inspection of the whole instrument." And in *Luffborough v. Parker*, 12 Serg. & R. 48, the certificate of proof given by the officer stated that A B appeared before him and made oath that he saw the grantor sign, seal, execute, and deliver the deed, without stating that A B was a subscribing witness; but as it appeared upon the inspection of the deed that A B was one of the subscribing witnesses, it was held that the certificate was sufficient. The statute under which the certificate was given required that a deed should be proved by one or more of the

subscribing witnesses before it could be recorded. "The act," said the court, "must be substantially complied with; but when substance is found, it is neither the duty nor the inclination of the court to defeat conveyances by severe criticism on language."

From the views thus taken of the acknowledgment before the deputy county clerk, it has become unnecessary to consider the proof subsequently made of the execution of the conveyance before a notary public, and the effect of the second report of the deed, on the 24th of April, 1860.

2. The deed to Stevens is not strictly a quitclaim. The operative words of release in a simple quitclaim deed are "re-mise, release, and quitclaim." Here the words "bargain, sell, and quitclaim" are employed, and they operate not merely to release, but to transfer any interest which the grantors possessed at the execution of the deed. Whether the words "in expectancy" can be considered, in the connection in which they are used, as referring to any greater or further estate in the premises, which the grantors might acquire in future, it is unnecessary to express any opinion. At the time the deed was executed, the claim of Heyerman and others to the land embraced in the grant to Padilla was pending before the land commission for confirmation. The decree of confirmation affirmed the validity of that grant, and of the claim of the petitioners. The patent following the confirmation took effect by relation at the date of the presentation of the petition to the land commission, on the 24th of February, 1852. As the deed of the United States, it is to be regarded, so far as all intermediate conveyances of the petitioners are concerned, as having been executed at that time: *Moore v. Wilkinson*, 13 Cal. 478; *Yount v. Howell*, 14 Id. 465; *Stark v. Barrett*, 15 Id. 361; *Ely v. Frisbee*, 17 Id. 250; *Leese v. Clark*, 18 Id. 570. The deed to Stevens must, therefore, be held to have passed the interest acquired by the patent. In *Landes v. Brant*, 10 How. 370, the supreme court of the United States applied the doctrine of relation for the protection of a title acquired by a sheriff's deed, upon a sale, under execution, of the conferee's interest, made after the presentation of his claim, and previous to the confirmation. The claim referred to in that case was filed in 1805, the sheriff's sale was made in 1808, the confirmation was had in 1811, and the patent issued in 1845; and the court said: "Applying the doctrine of relation, and taking all the several parts and ceremonies necessary to complete



the title together, 'as one act,' then the confirmation of 1811 and the patent of 1845 must be taken to relate to the first act, — that of filing the claim in 1805. On this assumption, intermediate conveyances made by the confirmer, or by the sheriff on his behalf, of a date after the first substantial act, are covered by the legal title, and pass that title to the alienee. And on this ground the deed made by the sheriff to McNair is valid."

3. The position that the deed to Stevens was only intended to pass the interest of the grantors in one half of a league of the four leagues embraced by the grant, finds no support from the deed itself, or from anything which appears in the record. The deed in terms conveys, as we have stated, all the interest of the grantors in the tract known as the Rancho of Roblar de la Miseria, — the designation given to the tract granted to Padilla. The tract is thus designated in the several conveyances produced on both sides. Subsequent to the deed to Stevens, numerous parties became possessed of undivided fractional interests in the premises, and some of them conveyed to others their interests only in a portion of the four leagues, — reserving from the operation of their conveyances a parcel known the Heyerman tract, embracing half a league, and from this circumstance the appellants' counsel draws the inference that the deed to Stevens was only intended to transfer the interest in this half-league. It is hardly necessary to observe that there is nothing in this circumstance to warrant the inference. The half-league may have been called the Heyerman tract for many reasons. Heyerman may have at one time resided upon this portion of the grant, or have inclosed it, or cultivated it, and it may have been thus called to distinguish it from the general tract. Whatever the reason for the designation, the fact neither shows nor tends to show that the deed to Stevens (even were this permissible against its language) only applied to the half-league, or that the grantors intended that it should only so apply.

The views we have thus expressed, as to the operation of the deed to Stevens, dispose of the principal questions presented by the appellants, — and in fact, of the merits of the case. The other questions raised, so far as they are covered by the grounds of the appeal embodied in the record (and only such can we notice), arise upon the rulings of the court below as to various transfers of undivided fractional interests in the premises. Some of these transfers were made under proceedings

had in the probate court, and the validity of the proceedings is attacked; one of them was made under a power of attorney from a married woman, and her capacity to confer the power is denied; and one of them has a certificate of acknowledgment which is impeached. Now, it is of no consequence whether the rulings of the court below upon these matters were erroneous or not. The admission in evidence of the conveyances attacked did not affect the right of the plaintiff to recover, nor would their exclusion have defeated him. If the conveyances were valid, the testator of the plaintiff was at his death seised in fee of the entire premises in controversy; but if they were invalid, he was only seised in fee of certain undivided interests. In either case, he was entitled at the time of his death to the possession of the entire premises as against the defendants, and all parties except his co-tenants; and as a consequence, could have recovered in ejectment against them. In *Stark v. Barrett*, 15 Cal. 371, the complaint alleged, as in the present case, that the plaintiff was seised in fee of the premises; but the proof showed that he was only thus seised as a tenant in common of one undivided half, and we held that he was, notwithstanding, entitled to recover against all parties but his co-tenant, and persons holding under him. "Under the allegation of seisin in the complaint," we said, "it was sufficient for the plaintiff to establish any interest in the premises which gave him a right of possession." See also *Smith v. Starkweather*, 5 Day, 210; *Bush v. Bradley*, 4 Id. 302. And by our law the executor is required to take possession of all the estate of the testator, both real and personal, and is authorized to maintain any action to recover the possession of such property, which the testator might have maintained: Act to Regulate the Settlement of the Estates of Deceased Persons, of May 1, 1851, secs. 194, 195.

This action was tried by the court without the intervention of a jury. Of course, in such cases, the court not only performs its peculiar and appropriate duty of deciding the law, but also discharges the functions of a jury, and passes upon the facts. The counsel of the appellants impressed, as it would seem, with this dual character, requested the court to charge itself as a jury, and handed in certain instructions for that purpose. The court thereupon formally charged that part of itself which was thus supposed to be separated and converted into a jury, commencing the charge with the usual address, "Gentlemen of the jury," and instructing that imagi-



nary body that if they found certain facts they should find for the plaintiff, and otherwise for the defendants, and that they were not concluded by the statements of the court, but were at liberty to judge of the facts for themselves. The record does not inform us whether the jury thus addressed differed in their conclusions from those of the court. These proceedings have about them so ludicrous an air that we could not believe they were seriously taken, but for the gravity with which counsel on the argument referred to them. If counsel, when a case is tried by the court without a jury, desire to present for consideration certain points of law as applicable to the facts established or sought to be established, upon which the court might be called to charge a jury, were there a jury in the case, the proper course is to present them in the form of propositions, preceding them with a statement that counsel makes the following points, or counsel contends as follows. The mode adopted in the present case, though highly original, is not of sufficient merit to be exalted into a precedent to be followed.

Judgment affirmed.

COPE and NORTON, JJ., concurred.

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**DEPUTIES AS OFFICERS:** See note to *Shelby v. Alcorn*, 72 Am. Dec. 184, 185. A deputy of a properly authorized officer has power in the name of his principal to take and certify acknowledgments of deeds: *Muller v. Boggs*, 25 Cal. 186; *Emswail v. Webb*, 36 Id. 203, citing the principal case.

**ONE TENANT IN COMMON MAY MAINTAIN EJECTMENT AGAINST ALL PERSONS** except his co-tenants or persons holding under them: *Hardy v. Johnson*, 1 Wall. 373; *Clark v. Lockwood*, 21 Cal. 221; *Hart v. Robertson*, Id. 348; *Mahoney v. Van Winkle*, Id. 583, citing the principal case; *McFarland v. Stone*, 44 Am. Dec. 325; but he cannot maintain the action against his co-tenant until actual ouster or its equivalent: *Lawton v. Adams*, 74 Id. 59, note 61.

**UPON TRIAL BY COURT WITHOUT JURY**, a party desiring a particular application of a principle of law to facts established, or sought to be established, should present his proposition to the court, and request a finding in accordance with his desire. If refused, he may have the refusal noted in a bill of exceptions: *Wilson v. Wilson*, 64 Cal. 94, citing the principal case; see *Harlan v. Bernie*, 76 Am. Dec. 428.

**ACKNOWLEDGMENTS OF DEEDS.** — This subject is treated in the note to *Livingston v. Kettelle*, 41 Am. Dec. 163-184.

## STATE v. MCGLYNN.

[20 CALIFORNIA, 283.]

**DECREE OF PROBATE COURT ADMITTING WILL TO PROBATE IS FINAL AND CONCLUSIVE** as to validity thereof, if not reversed by the appellate court, and is not liable to be vacated or questioned by any other court, either incidentally or by any direct proceeding for the purpose of impeaching it.

**WILL ADMITTED TO PROBATE MUST BE RECOGNIZED AND ADMITTED** in all courts to be valid so long as the probate stands.

**COURTS OF CHANCERY IN ENGLAND HAVE NO POWER TO DETERMINE VALIDITY OF WILL** of either real or personal property. Their comprehensive jurisdiction to set aside other fraudulent instruments does not extend to wills obtained by fraud.

**ENGLISH COURTS OF CHANCERY HAVE DEPRIVED PARTIES OF BENEFIT OF FRAUDULENT WILL** in some cases, by decreeing that such parties shall hold the property under the will in trust for the parties who would have been entitled to it if such will had not been probated; but they have in all such cases disclaimed any power to set aside the will or the probate.

**PRINCIPLES ESTABLISHED IN ENGLAND APPLY TO AND GOVERN CASES** arising under probate law of this country.

**DECREE ADMITTING WILL TO PROBATE CANNOT BE REVIEWED OR SET ASIDE BY COURT OF CHANCERY** on the ground that the will was obtained by fraud, or on any other ground.

**REASON THAT DECREE ADMITTING WILL TO PROBATE IS CONCLUSIVE AS TO VALIDITY OF WILL** upon all persons and all courts is, that the probating of a will is not a proceeding to decide a contest between parties, but a proceeding *in rem*, to determine the character and validity of an instrument affecting the title to property, and which it is necessary for the repose of society should be definitely settled by one judgment.

**DANGER OF HOLDING DECREE ADMITTING WILL TO PROBATE FINAL AND CONCLUSIVE** is obviated by the right of appeal to the supreme court and the statutory provisions permitting the contest of the decree or of the validity of the will at any time within one year, and securing the rights of persons under disabilities.

**QUESTION WHETHER OR NOT STATE IS AFFECTED BY LIMITATION OF ONE YEAR** within which probate may be contested need not be decided in a proceeding commenced by the state in a district court for the purpose of setting aside the probate of a will, since the only effect of exempting the state from the limitation would be to authorize the state to institute such proceedings in the probate court, not to confer jurisdiction on the district court.

**INJUNCTION TO PROTECT PROPERTY DURING LITIGATION WILL NOT BE ALLOWED**, where the complaint shows that the party seeking the injunction has no title to or interest in the property, and no claim to the ultimate relief sought by the litigation.

**INJUNCTION WILL NOT BE GRANTED AT SUIT OF STATE** to prevent dissipation of the property of an estate pending litigation under an information filed by the state, seeking a decree that the estate had escheated to the state, where the complaint for the injunction shows that a will of the deceased has been admitted to probate, by which the estate is devised, though it is alleged that the will is a forgery; for the state is not entitled to the ultimate relief sought by the litigation, since the decree of the probate court establishing the will is final and conclusive.

**STATUTE RELATING TO SUBJECT-MATTER OF ORDER MADE PREVIOUS TO ITS PASSAGE** will not affect the decision of the appellate court on appeal from the order.

**APPEAL** from an order of the district court granting an injunction at the suit of the state against McGlynn and Butler, executors of the last will and testament of D. C. Broderick, deceased. The opinion states the case.

*Hoge and Wilson*, for the appellants.

*J. B. Haggin*, for the heirs at law.

*Gregory Yale*, for the respondent.

By Court, NORTON, J. The complaint in this action sets forth that the attorney-general, in behalf of the people, has filed an information in the same court, asking for a decree that the estate of the late David C. Broderick has escheated to the people of the state; that the attorney-general files his bill in equity, and seeks the aid of the equity powers of the court in furtherance of the objects and purposes of said information; that said Broderick died on the sixteenth day of September, 1859, intestate, leaving no heirs, representatives, or devisees capable of inheriting any of his real or personal estate; that said Broderick left certain real and personal estate in the city and county of San Francisco, which has escheated to the state; that on the 20th of February, 1860, the defendants presented a paper-writing, purporting to be the last will and testament of said Broderick, to the probate court of the county of San Francisco for probate; that on the eighth day of October, 1860, a judgment or decree was entered by said probate court, admitting such paper-writing to probate as the last will and testament of said Broderick, and granting letters of administration with the will annexed to the defendants; that said paper-writing, purporting to be the last will and testament of said Broderick, was a false and forged paper, and was fabricated, after the death of said Broderick, by certain persons with George Wilkes, whose name appears as the universal devisee; that the defendant Butler caused false testimony to be used in procuring said decree of probate; that the defendants, as executors, have allowed certain debts against said estate, and have applied to the probate judge for leave to sell the real estate to pay said debts, and a legacy to McGlynn, and that an order allowing such sale has been made, and the property advertised for sale, and that if such

sale takes place to innocent purchasers, it will work irreparable injury to the plaintiff, by causing a great number of parties to become interested, and by casting a cloud upon the plaintiff's title; that the defendants are in the actual possession of said real estate; that the knowledge of said fraud and forgery came to the attorney-general in shape to warrant legal proceedings in behalf of the state only after the eighth day of October, 1861, when it was too late to apply to the probate court to revoke the probate of said paper-writing. After setting forth certain other matters not material to specify here, the complaint prays, among other things, that the decree admitting the said forged will to probate, and the order allowing the sale of said real estate, be set aside, and annulled, and declared of no effect; that the sale of the real estate be enjoined, and the defendants be restrained from further intermeddling with the estate; that this case be retained until said information be determined; that said will be declared a forgery, and of no effect; and that said real estate be declared to have escheated to the people of the state, without incumbrance or liabilities.

The answer of McGlynn, among other things, on information and belief, denies that said Broderick died intestate; and avers that said paper-writing was the genuine last will and testament of said Broderick; and that the devisee, George Wilkes, therein mentioned, is and was at the death of said Broderick a citizen of the United States, resident of the state of New York, and in every way capable of inheriting and receiving as such devisee any of the real and personal property of the said estate; and denies that the said Butler, or any other person, caused any false testimony to be used in procuring said decree of probate.

It is not necessary to consider what is the proper effect, on an application for an injunction, of a complaint filed on behalf of the people without verification, or the effect of an answer in such a case denying the material averments on information and belief, because the facts on which our decision depends are not disputed, but are averred in the complaint, and are admitted and insisted upon in the answer. It is not claimed in the complaint but that the devisee named in the will is capable of taking and holding the estate, if the will is valid.

The purpose of this action is to aid the proceeding by information instituted to determine the escheat of the estate of David C. Broderick. The aid sought is a judgment, which

will have the effect to set aside and vacate the probate of what is claimed to be a forged will, by which Broderick devised and bequeathed his estate, real and personal, principally to George Wilkes, who is a devisee capable of taking and holding, and to set aside the will. To displace this probate and set aside the will is necessary to the success of the proceeding by information, since the existence of such a devisee prevents the estate from escheating. An escheat occurs only when a person shall die seised of any real and personal estate, and leaving no heirs, representatives, or devisees capable of inheriting or holding the same.

The fact that a will purporting to be the genuine will of Broderick, devising his estate to a devisee capable of inheriting and holding it, has been admitted to probate and established as a genuine will by the decree of a probate court having jurisdiction of the case, renders it necessary to decide whether that decree, and the will established by it, or either of them, can be set aside and vacated by the judgment of any other court. If it shall be found that the decree of the probate court, not reversed by the appellate court, is final and conclusive, and not liable to be vacated or questioned by any other court, either incidentally or by any direct proceeding, for the purpose of impeaching it, and that so long as the probate stands the will must be recognized and admitted in all courts to be valid, then it will be immaterial and useless to inquire whether the will in question was in fact genuine or forged.

The magnitude of the estate in litigation naturally awakens unusual attention, and prompts the inquiry whether so serious a question as the truth or falsity of this will can be forever settled by the simple decision of one court, and that a court which, for most purposes, is not of the highest jurisdiction; and whether, if such be the case, it is owing to any defect in judicial proceedings peculiar to this state or to this country. In view of the interest in this question excited by this case, it is not inappropriate to say that the laws of this state upon this subject are in no respect peculiar or singular; and the decision of this question by this court must be in conformity with, and controlled by, the uniform decisions of the same question which have been made by the courts of the other states and of England.

In England, the probate of wills of personal estate belongs to the ecclesiastical courts. No probate of a will relating to

real estate is there necessary. The real estate, upon the death of the party seised, passes immediately to the devisee under the will, if there be one; or if there be no will, to the heir at law. The person who thus becomes entitled takes possession. If one person claims to be the owner under a will, and another denies the validity of the will and claims to be the owner as heir at law, an action of ejectment is brought against the party who may be in possession by the adverse claimant; and on the trial of such an action, the validity of the will is contested, and evidence may be given by the respective parties as to the capacity of the testator to make a will, or as to any fraud practiced upon him, or as to the actual execution of it, or as to any other circumstance affecting its character as a valid devise of the real estate in dispute. The decision upon the validity of the will in such an action becomes *res judicata*, and is binding and conclusive upon the parties to that action, and upon any person who may subsequently acquire the title from either of those parties; but the decision has no effect upon other parties, and does not settle what may be called the *status* or character of the will, leaving it subject to be enforced as a valid will, or defeated as invalid, whenever other parties may have a contest depending upon it. A probate of a will of personal property, on the contrary, is a judicial determination of the character of the will itself. It does not necessarily or ordinarily arise from any controversy between adverse claimants, but is necessary in order to authorize a disposition of the personal estate in pursuance of its provisions. In case of any controversy between adverse claimants of the personal estate, the probate is given in evidence and is binding upon the parties, who are not at liberty to introduce any other evidence as to the validity of the will.

In this condition of the law as to the mode of proving wills in England, a vast number of cases have arisen, in which applications have been made to the court of chancery to set aside wills upon the ground that they were obtained by fraud. These applications have been made upon the maxim that fraud is a peculiar object of chancery jurisdiction, and the detection and defeating of it one of the special objects for which courts of chancery were established. But in these cases, the relief sought has been uniformly denied, for the reason that the court of chancery has no power to determine the validity of a will. However comprehensive the jurisdiction may be to set aside other fraudulent instruments, all control

over wills has been disavowed by the court of chancery. The reason assigned, as respects wills of personal property, is that the subject belongs exclusively to the ecclesiastical courts, which courts are alone competent to decide upon their validity, as well where that depends upon a question of fraud as upon any other ground: *Archer v. Mosse*, 2 Vern. 8; *Allen v. Dundas*, 3 Term Rep. 131; *Gingell v. Horne*, 9 Sim. 539. As respects wills of real estate, the reason assigned in some cases is that there is a remedy at law; and in others it is said generally that the court of chancery has no jurisdiction to determine the validity of a will: *Kerrick v. Bransby*, 7 Brown Parl. Cas. 437; *Jones v. Jones*, 7 Price, 663; *Jones v. Frost*, Jacob, 466; *Pemberton v. Pemberton*, 13 Ves. 290. As the reason that the ecclesiastical courts have exclusive jurisdiction does not apply to wills of real estate, and as the reason that there is a remedy at law applies equally to other instruments over which courts of chancery exercise jurisdiction to set them aside for fraud, it has been said that the reasons assigned by courts of chancery for declining to take jurisdiction in cases of wills of real estate alleged to be obtained by fraud are not satisfactory. But notwithstanding this objection to the sufficiency of the reasons assigned, the fact that the jurisdiction does not exist has been constantly asserted through a long line of decisions, and is as firmly established as any other principle in regard to chancery jurisdiction: See cases above cited.

Courts of chancery, in their efforts to defeat fraudulent practices, have in some cases deprived parties of the benefit of the fraudulent will by decreeing that such parties shall hold the property under the will in trust for the parties who would have been entitled to it if such will had not been probated. In such cases, however, they have disclaimed any power to set aside the will or the probate, and the resort to this circuitous mode of defeating a fraud but the more clearly evinces how firmly the principle is fixed that they have no power to act directly upon the subject. In one case, *Barnesly v. Powel*, 1 Ves. Sen. 284, the court decreed the party claiming under a probated will to go into the probate court and consent to the probate being set aside. It claimed to do this upon the ground that the probate was obtained by virtue of a deed of proxy fraudulently procured; and as the court of chancery had the power to set that deed aside, it would leave the probate without any foundation. At the same time that this novel proceeding was adopted, the court say it will be done "without



interfering with any jurisdiction." This is the only case, so far as we are aware, since the decision in the case of *Kerrick, v. Bransby*, 7 Brown Parl. Cas. 437, in the year 1727, in which a probate has been avoided even indirectly by the aid of a court of chancery; and this was effected, not by the decree or order of the court of chancery operating upon the decree of probate, but coercing the party to consent that the probate court should set aside its own decree. In the case of *Gingell v. Horne*, 9 Sim. 539, the vice-chancellor says: "The impression which has been fixed in my mind for several years is, that it is settled law that there is no method of escaping from the effect of probate when granted, unless in a case like that of *Barnesly v. Powel*, 1 Ves. Sr. 284, in which Lord Hardwicke set aside the ground on which the probate was obtained." It is said in some cases that a court of chancery in cases of wills of real estate can send out an issue to a court of law and have the question of the validity of the will tried by a jury. But that occurs only in cases where no objection is taken to the jurisdiction, and does not mean that an action can of right be instituted in a court of chancery for the purpose of having the validity of a will determined by an issue to be sent out of that court. In the case of *Jones v. Jones*, 3 Meriv. 171, the master of the rolls says: "It is impossible that at this time of day it can be made a serious question whether it be in this court [of chancery] that the validity of a will, either of real or personal estate, is to be determined. . . . Now, although there may have been instances of issues directed on the bill of an heir at law, where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot insist on any such direction. He may bring his ejectment, and if there be any impediments to the proper trial of the merits, he may come here to have them removed; but he has no right to have an issue substituted in the place of an ejectment."

In the United States, the probating of wills is regulated in most states, and probably in all, by statutes in which the power to probate wills is conferred upon a special court, a probate or surrogate court, corresponding in this respect to the ecclesiastical courts of England. In some of the states, following the English system, the power to probate is only given in cases of wills of personal estate, leaving wills of real estate to be proved on the trial of any particular action depending upon it. In others, the power to probate is extended to both kinds of wills, but making it conclusive only in cases of wills

of personal property, and only *prima facie* evidence, and liable to be disproved on trials of cases depending upon wills of real estate. In others, the power to probate applies to wills of both kinds, and the same conclusive effect is given to the probate in both cases.

Upon examining the decisions of the supreme court of the United States, and of the courts of the several states, it will be found that they have uniformly held that the principles established in England apply and govern the cases arising under the probate laws of this country; and that in the United States, wherever the power to probate a will is given to a probate or surrogate's court, the decree of such court is final and conclusive, and not subject, except on an appeal to a higher court, to be questioned in any other court, or be set aside or vacated by the court of chancery on any ground.

In the case of *Gaines v. Chew*, 2 How. 645, the court say: "In cases of fraud, equity has a concurrent jurisdiction with a court of law; but in regard to a will charged to have been obtained through fraud, this rule does not hold. It may be difficult to assign any satisfactory reason for this exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal, is the only one that can be given." In the case of *Tompkins v. Tompkins*, 1 Story, 547, Judge Story, in speaking of the law of England, says: "The validity of wills of real estate is solely cognizable by courts of common law in the ordinary forms of suits, and the verdict of the jury in such suits, and the judgment thereon, are, by the very theory of the law, conclusive only as between the parties to the suit and their privies. But it is far otherwise in cases of personal estate. The sentence and decree of the proper ecclesiastical court, as to the personal estate, is not only evidence, but is conclusive as to the validity or invalidity of the will; so that the same question cannot be re-examined or litigated in any other tribunal. The reason is, that it being the sentence or decree of a court of competent jurisdiction directly upon the very subject-matter in controversy, to which all persons who have any interest are or may make themselves parties, for the purpose of contesting the validity of the will, it necessarily follows that it is conclusive between those parties. For otherwise there might be conflicting sentences or adjudications upon the same subject-matter between the same parties; and thus the subject-matter be delivered over to interminable doubts, and the general rules of law as to the

effect of *res judicata* to be completely overthrown. In short, such sentences are treated as of the like nature as sentences or proceedings *in rem*, necessarily conclusive upon the matter in controversy for the common safety and repose of mankind." Then, after stating that by the laws of Rhode Island the probate courts have complete jurisdiction as to the probate of wills, whether the wills respect real estate or personal estate, or both; and making some remarks upon the effect of these local laws, he says: "In short, there can be no difference in point of principle, where the court of probate has an absolute and positive jurisdiction, whether the will respects real estate or personal estate. In such case, the will must be equally open to controversy in all other courts and suits, or it is closed in all. Yet no one pretends that the probate is not conclusive as to the personal estate of the testator, and the title of the executor thereto. . . . Upon the whole, in the absence of all controlling authorities under the local law, looking at the matter upon principle, I am of opinion that the probate of the present will by the supreme court of the state, being a court of competent jurisdiction, is final and conclusive upon the question of the validity of the will to pass the real estate in controversy."

In the case of *Adams v. De Cook*, 1 McAll. 253, the court say: "In this state [California], where the general power of proving all wills is vested in a special jurisdiction known as the probate court, the jurisdiction of the tribunal is as conclusive, in regard to the probate of wills of real and personal estate, as is that of the ecclesiastical courts in England in relation to wills of personalty. If, therefore, there had been a probate of this document as a will by the appropriate tribunal in this state, such action, if final, would have been conclusive." In the case of *Deslonde v. Darrington*, 29 Ala. 95, the court say: "The probate of a will under any circumstances is a proceeding *in rem*. It operates upon the thing itself. It defines, and in a great degree creates, its *status*. The *status* thus defined adheres to it as a fixture; and the judgment or decree in the premises, unless avoided in some mode prescribed by law, binds and concludes the whole world." In the case of *Bogardus v. Clark*, 4 Paige, 625, the court say: "It [a probate of a will of personalty] is in the nature of a proceeding *in rem*, to which any person having an interest may make himself a party, by applying to the proper tribunal before which such proceeding is had, and who will therefore be bound by the sen-

tence or decree of such tribunal, although he is not in fact a party." In *Woodruff v. Taylor*, 20 Vt. 65, the court say: "The probate of a will I conceive to be a familiar instance of a proceeding *in rem* in this state. The proceeding is in form and substance upon the will itself. No process is issued against any one, but all persons interested in determining the state or condition of the instrument are constructively notified by a newspaper publication to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money or do any particular act, but that the instrument is or is not the will of the testator. It determines the *status* of the subject-matter of the proceeding. The judgment is upon the thing itself; and when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to all the world (at least so far as the property of the testator within this state is concerned), just what the judgment declares it to be." In the case of *Ballow v. Hudson*, 13 Gratt. 682, the court say: "Considerations of public policy require that all questions of succession to property should be authoritatively settled. Courts of probate are therefore organized to pass on such questions, when arising under wills; and a judgment by such court is conclusive whilst it remains in force, and the succession is governed accordingly. A judgment of this nature is classed amongst those which in legal nomenclature are called judgments *in rem*. Until reversed, it binds not only the immediate parties to the proceeding in which it is had, but all other persons and all courts."

The cases above cited have been selected from a great body of cases of like import, because, while showing the conformity of our laws with those of England, as to the conclusiveness of probate decrees, they also show the reason why they are conclusive, not only upon the parties who may be before the court, but upon all other persons and upon all courts; and that is, that it is not a proceeding to decide a contest between parties, but a proceeding *in rem*, to determine the character and validity of an instrument affecting the title to property, and which it is necessary for the repose of society should be definitely settled by one judgment, and not left to be buffeted about by different and possibly conflicting judgments of various courts.

In the state of California, the jurisdiction of the probate court is the same in regard to wills of real estate as to wills of personal estate.

The argument is strongly urged that it will give great en-

couragement to fraudulent practices, and in many cases lead to the despoiling of rightful heirs of their inheritance, if the decision of the probate court is not subject to be set aside by the court of chancery, on allegations of fraud. This consideration has not escaped the attention of the legislature of this and other states, and laws have been passed to obviate this danger, so far as seemed practicable, without on the other hand exposing persons innocently dealing with estates of deceased persons to be harassed by subsequently discovered frauds. Hence a period is provided in some states, and probably in all, in which, after judgment is pronounced, parties interested may have the decree opened, and the question of the validity of the will re-examined. This time varies in different states. We learn from some of the cases cited that in Virginia it is seven years, in Alabama it is five years. In New York, as to personal property,—as to which only the decree is conclusive,—the time is one year. In this state, where there is no distinction between wills of real and personal estate, the time is but one year. In the act to regulate the settlement of the estates of deceased persons, it is provided by section 30 as follows: “When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same, or the validity of the will. For that purpose, he shall file in the court, before which the will was proved, a petition in writing, containing his allegations against the validity of the will, or against the sufficiency of the proof, and praying that the probate may be revoked.” By section 36, as follows: “If no person shall, within one year after the probate, contest the same, or the validity of the will, the probate of the will shall be conclusive; saving to infants, married women, and persons of unsound mind, a like period of one year after their respective disabilities are removed.” These provisions of our statute are but the embodiment of the principles of law which have been settled by the decisions of the courts in England and the United States as being the most expedient and just, having regard to the rights of persons claiming the estate of a deceased owner, and the requirements of society that the title of property should, as soon as practicable, be made certain and withdrawn from the arena of litigation. A special tribunal is therefore established to decide upon the validity of wills, and the decision of that tribunal is made final and conclusive; giving, however, a right of review by the supreme court, and a fur-

ther right of a new action or proceeding in the same tribunal within one year after the decision of the first proceeding, and securing the rights of persons under disabilities. The limitation of one year within which the new trial must be demanded is shorter than in some states, where the decree is made conclusive upon real as well as personal estate, but it is the same as that allowed in New York in cases of personal estate, and in providing which direct reference was had to the conclusiveness of the decree. The revisers, as a reason for allowing a rehearing within one year, say: "The notice previous to proving a will is necessarily short, and must often be inadequate to apprise all the parties interested; and yet it would seem that when once admitted to proof the probate is perfectly conclusive." Although one year as a bar to further litigation as to real estate held under a will is shorter than in other states, it is not disproportioned to our limitation of real actions as compared with other states. Twenty years is the usual time limited for bringing real actions in other states, while in ours it is only five. Nevertheless, the time, as affecting real estate, is too short, in consideration of the policy which has been applied to the subject in other states; but whether this has arisen from an ill-judged policy of our legislature, in seeking to quiet titles by too summary a process, or by inadvertence in not distinguishing between real and personal property, the remedy is not within the power of courts.

This review of the cases decided in England and in the United States establishes that it is a perfectly settled doctrine that the decision of the court to which the proof of wills is confided, whether of real or personal estate, is conclusive upon the question of the validity or invalidity of the will; that this decision cannot be questioned collaterally in any other court; and that it cannot be reviewed or set aside by the court of chancery on an allegation of fraud, or on any other ground.

The only decision in our own state directly upon the subject is in consonance with those of other states. In the case of *Castro v. Richardson*, 18 Cal. 478, the court say: "The court of probate have exclusive jurisdiction of matters relating to the proof of wills; and before a will can be read in evidence in support of a title under it, the party seeking to introduce it must show that it has been regularly admitted to probate. It was intended that the mode of proof pointed out by the statute should be uniformly pursued, and to give effect to that intention, it is necessary to maintain the exclusive authority of the



probate courts. Ample provision is made for determining controversies arising in the course of their proceedings; and in rejecting a will or admitting it to probate they act judicially, and their acts possess conclusive force."

Although the prayer of the complaint in this action asks a decree that the will in question be declared a forgery and of no effect, yet a distinction is claimed to exist as to the power of a court of chancery to set aside a decree of a probate court, if it must be conceded that the power does not exist to decide upon the validity of a will; but no cases are referred to in which such a distinction is taken. The only case referred to as countenancing such a view is that of *Barnesly v. Powel*, 1 Ves. Sr. 284, but in which, as we have seen, the court disclaim the power to set aside the decree, and only exercised the power to set aside a deed of consent on which the decree rested; and by reason of having jurisdiction of the party for that purpose, decreed him to consent to the vacating the probate decree. Indeed, we are unable to see how the line is to be drawn, at least in this case, between the power to set aside the decree of probate and that to declare the will a forgery; because the only fraud charged to have been practiced in procuring the probate is the false testimony of witnesses as to the validity of the will. No fraud was practiced upon the heirs to procure a consent to the probate, as in the case of *Barnesly v. Powel*, 1 Ves. Sr. 284, nor any device to prevent a full investigation before the probate court. The court of chancery has no capacity, as the authorities have settled, to judge or decide whether a will is or is not a forgery; and hence there would be an incongruity in its assuming to set aside a probate decree establishing a will, on the ground that the decree was procured by fraud, when it can only arrive at the fact of such fraud by first deciding that the will was a forgery. There seems, therefore, to be a substantial reason, so long as a court of chancery is not allowed to judge of the validity of a will, except as shown by the probate, for the exception of probate decrees from the jurisdiction which courts of chancery exercise in setting aside other judgments obtained by fraud. But whether the exception be founded in good reason or otherwise, it has become too firmly established to be disregarded. At the present day, it would not be a greater assumption to deny the general rule that courts of chancery may set aside judgments procured by fraud, than to deny the exception to that rule in the case of probate decrees. We must acquiesce in the prin-



ciple established by the authorities, if we are unable to approve of the reason. Judge Story was a staunch advocate for the most enlarged jurisdiction of courts of chancery, and was reluctant to allow the exception in cases of wills, but was compelled to yield to the weight of authority. He says: "No other excepted case is known to exist; and it is not easy to discover the grounds upon which this exception stands, in point of reason or principle, although it is clearly settled by authority": 1 Story's Eq. Jur., sec. 440.

It is said that the period of one year fixed for persons interested to have the probate of a will opened and reconsidered is a limitation which does not run against the state. It is not important to decide this; because, if it could be considered in that light, the only effect would be to authorize the state to institute such proceedings in the probate court, not to confer jurisdiction upon the district court; and no wish or purpose to institute such a proceeding is suggested in this case.

This case comes before us on an appeal from an order allowing an injunction. The court below, after considering to some extent, but without deciding, whether a district court has jurisdiction to set aside the probate of a will, or to declare a will void, states that it has power to protect property by injunction pending another litigation; and the injunction in this case appears to have been granted solely on this ground of jurisdiction, in order to prevent a dissipation of the property pending the litigation on the information for an escheat. But it is always an absolute objection to the allowance of an injunction, for the purpose of protecting property during a litigation, that the complaint shows that the party seeking the injunction has no title to or interest in the property, and no claim to the ultimate relief sought by the litigation; in other words, that the complaint shows no equity. This complaint shows affirmatively and distinctly that a will has been in due form admitted to probate, by which the property in question is devised to a person whom it is not denied is capable of taking and holding it. If, as we have concluded, the district court has no power to set aside that probate and will, or to disregard the probate and investigate the validity of the will on the trial of the information, then the existence of that probate, and the will established by it, is a bar to the ultimate relief sought in this action, and by the information to which this action is auxiliary, and as a consequence precludes all reason or object for an injunction, and with it the right to one.

A law was enacted on the 3d of March, 1862, relating to this subject; but it is not necessary to consider what may be its effect in other cases; because, although it was brought to our notice, it was not urged by counsel that it could affect our decision, since it was not in force at the time this case was decided by the court below, nor until after the case was pending before us on appeal. We must decide whether the order made by the court below was correct or erroneous at the time it was pronounced.

The order appealed from must therefore be reversed, and the injunction dissolved.

FIELD, C. J., and COPE, J., concurred.

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LAW ENACTED AFTER CASE HAS ARISEN CAN BE NO PART OF IT: *Menges v. Dentler*, 75 Am. Dec. 616, note 621.

CONCLUSIVENESS OF PROBATE OF WILL: See note to *Bowen v. Johnson*, 73 Am. Dec. 53, 54; and the subject discussed in the note to *Schultz v. Schultz*, 60 Id. 353 et seq.; see also *Michael v. Baker*, 71 Id. 593. After administration granted upon the estate of a living person, and after it is closed and the administrator discharged, it is proper for the supposed decedent to appear and move, in the court granting the administration, the entry of an order vacating and annulling the proceedings; and the court may properly grant such motion: *Stephenson v. Superior Court*, 62 Cal. 64, citing the principal case.

INJUNCTIONS AGAINST LEGAL OR JUDICIAL PROCEEDINGS: See *Pollock v. Gilbert*, 60 Am. Dec. 732, and note 737; *Barnes v. Ward*, 57 Id. 590; *Jonckin v. Holland*, 50 Id. 414; *Hamilton v. Adams*, Id. 150.

DUTY OF APPELLATE COURT IS SIMPLY TO REVIEW RULINGS OF LOWER COURT EXCEPTED TO: *Bolles v. Beach*, 53 Am. Dec. 263; *Planters' Bank v. Calvit*, 41 Id. 616.

PARTIES IN INTEREST MAY CONTEST VALIDITY OF WILL IN PROBATE COURT, IN ILLINOIS, as well as by a bill in chancery: *Duncan v. Duncan*, 76 Am. Dec. 699.

RELIEF IN EQUITY AGAINST DECREE OF PROBATE COURT: See *Wilson v. Randall*, 76 Am. Dec. 347.

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## BLEN v. BEAR RIVER AND AUBURN WATER AND MINING COMPANY.

[20 CALIFORNIA, 602.]

PRESIDENT OF CORPORATION HAS NO AUTHORITY AS SUCH TO MAKE CONTRACTS binding upon the corporation, except as to matters arising in the ordinary course of the business of the corporation.

PRESIDENT OF CORPORATION HAS NO AUTHORITY TO BIND CORPORATION BY CONTRACT for purchase of land to be used in extending the operations of the corporation, as this is not a matter within the ordinary course of the business of the corporation.

**RATIFICATION BY CORPORATION OF CONTRACT MADE BY PRESIDENT WITHOUT AUTHORITY** must be made with full knowledge of the terms of the contract.

**RATIFICATION AMOUNTS IN ITSELF TO PRESUMPTIVE EVIDENCE OF EVERYTHING NECESSARY TO SUSTAIN IT;** it supposes a knowledge of the thing ratified, and in the case of a contract, that its terms were known; and if there was any mistake or misapprehension, that fact must be shown.

**RATIFICATION BY BOARD OF TRUSTEES OF CORPORATION OF CONTRACT FOR PURCHASE OF LAND,** made without authority by the president, who was also one of the trustees, will be presumed to have been made with full knowledge of the terms of the contract, where the president participated in the meeting at which the ratification was made, and made a written report, which stated partially, but not fully, the terms of the contract, which report and proceedings the trustees, by a vote, ratified. The mere fact that the report did not state all the terms of the contract is no evidence that the board was ignorant upon the subject. And from the fact of the presence of the president at the meeting it may be inferred that the trustees were fully informed.

**TO AVOID CONTRACT FOR PURCHASE OF LAND ON GROUND OF FRAUD IN VENDOR,** vendee must repudiate contract and demand its rescission immediately upon discovering the fraud; and if after such discovery he remains quietly in possession for a long time, he cannot afterwards avoid the contract.

**PRESIDENT OF CORPORATION OWNING STOCK THEREIN IS INCOMPETENT,** on the ground of interest, to testify concerning his acts as agent of the corporation. The exception to the general rule, so far as the members of a corporation are concerned, seems to be confined to keepers and depositaries of corporate documents.

**ACTION** for breach of contract. Verdict and judgment for the plaintiff. And appeal by the defendant from an order denying his motion for a new trial. The opinion states the case.

*S. Heydenfeldt*, for the appellants.

*Tuttle and Hillyer*, for the respondent.

By Court, COPE, J. The plaintiff sues to recover a sum of money alleged to be due him on a sale to the defendant of certain ditch property. The defendant is a corporation, and the contract for the property was made on its behalf by one Neall, who was its president, and a member of the board of trustees. The answer puts in issue the authority of Neall to make the contract, and sets up certain matters of fraud and misrepresentation as destroying its validity. These constitute the principal points of inquiry in the case, and we shall consider them without reference to the particular exceptions taken at the trial.

On the question of authority, the plaintiff relies upon the

general powers of Neall as president, and upon a ratification by the board of trustees, and various acts showing an acceptance of the contract. It is clear that Neall had no such authority merely as president, for his powers in that capacity only extended to matters arising in the ordinary course of the business of the corporation. Outside of these matters he had no power to bind the corporate body, and he was not authorized to make contracts for the purchase of property, unless required in the usual course of business. The property purchased was for the use of the corporation, but the object in view was to extend its operations, and the purchase was of no utility for any other purpose.

The evidence of a ratification by the board of trustees is drawn from the record of its proceedings, and it is contended that, taking the contract and the record together, no ratification appears. It is claimed that the board acted upon information communicated by Neall in a written report upon the subject, some of the provisions of the contract being omitted in the report. The report does not profess to give the details of the contract in every respect, but states generally the fact of the purchase, and the price to be paid; and points out the advantages to result from the transaction. The record recites that the board, by a unanimous vote, ratified the "report and proceedings," Neall being present, participating in the ratification. The position taken is, that the board based its action solely upon the report, and was not sufficiently informed of the terms of the contract to make the ratification binding. In other words, that the board acted in the matter without a knowledge of the facts, and that a ratification under such circumstances is not valid and cannot be enforced.

The rule invoked is undoubtedly correct, but we do not consider the case a proper one for its application, as in our opinion the point raised rests upon a mere assumption. As Neall was present, it is hardly to be supposed that the report was received and voted upon in silence, for the matter was of too much importance to be disposed of in that manner. The natural presumption is that it was fully considered, and the particulars inquired into and explained, and the idea that this was not done is certainly at variance with the usual mode of conducting business. If it were not for the report, no doubt could possibly be entertained upon the subject, for the ratification amounts in itself to presumptive evidence of everything required to sustain it. A ratification supposes a knowledge of

the thing ratified, and in the case of a contract, the inference from the ratification is that its provisions were known. When the ratification is proved, this inference necessarily follows, and if there was any mistake or misapprehension, that fact must be shown. There is no evidence of any mistake in this case, and we cannot infer that the board knew nothing of the contract, except through the medium of the report. The circumstances indicate a different state of facts, for it is unreasonable to suppose that the board, with Neall at its head, confirmed the contract in ignorance of its terms. It cannot be said that the contract was not included in the ratification, for the "proceedings" were ratified as well as the report, and the "proceedings" embraced the contract. It amounted to an express ratification of the contract; and the mere fact that the report does not state all its provisions is no evidence that the board was ignorant upon the subject. In this view, it is unnecessary to inquire whether the knowledge of Neall was of itself sufficient to bind the corporation; but we are inclined to the opinion that it was not. A similar question has occasionally arisen in other states, but the decisions are by no means harmonious; nor is there much difference in the weight of authority on each side. The subject is mentioned by Judge Story in his work on the law of agency, but he merely refers to it, and arrives at no satisfactory conclusion. He cites the cases, however, and says that upon principle, notice to one trustee, unknown to the other members of the board, ought not to bind the corporation.

The subsequent acts relied on are the acceptance of a deed and the taking possession of and using the property; all of which, however, are consistent with the idea of a ratification by mistake. If it were shown that the board really acted under a misapprehension of the contract, we should be disposed to regard the subsequent acts as attributable to the same error. If it appeared that the contract had been ratified by mistake, the presumption would be that the mistake continued throughout; but this, as we have stated, does not appear.

The fraud complained of was fully investigated by the jury, and we are unable to discover any error for which the verdict should be set aside. The evidence was submitted under proper instructions from the court, and it would require a very clear showing, in such a case, to induce us to interfere. If any fraud was committed, the fact was known long prior to the commencement of this suit, and it is too late now to avoid

the contract on that ground. The offer to rescind should have been made as soon as the fraud was discovered, and the defendant could not remain in possession, quietly enjoying the property, and afterwards repudiate the contract. This is also an answer to the point taken as to a partial failure of the consideration, except so far as such failure is relied upon by way of recoupment. In this respect, however, we think the defense entirely fails, as the defendant undoubtedly received all that was contracted for. There was no breach of warranty, and there is no evidence from which fraud is necessarily to be inferred; and the right to recoup has no foundation to rest upon. It is said that the purchase was of a ditch represented to have priority of right to the water, and that this representation was untrue and intended to mislead. The inference from the evidence is, that the plaintiff made it in good faith, believing it to be true, and it is at least doubtful whether even the effect was to deceive. The matter was open to the investigation of both parties, and there is some evidence showing that the purchase was made with knowledge that the priority was disputed. We regard the allegations of fraud, however, as really unworthy of consideration, for the evidence is wholly insufficient to justify the charge of intentional misrepresentation.

We have examined the additional points made, and do not regard any of them as well taken; nor are they of sufficient importance to entitle them to special notice. The only point about which we have entertained a doubt is the rejection of Neall as a witness for the defendant; but we have come to the conclusion that he was properly rejected. We were disposed to regard him as standing in the position of an ordinary agent, and to hold his testimony admissible *ex necessitate*, as in other cases of agency, but we are satisfied that his interest disqualified him. The exception to the general rule, in such cases, so far as the members of a corporation are concerned, seems to be confined to keepers and depositaries of corporate documents. Members acting for the corporation in ordinary matters of business are not included, and when interested, they are incompetent to testify. The cases of *McAuley v. York Mining Co.*, 6 Cal. 80, and *Mokelumne Hill Canal Co. v. Woodbury*, 14 Id. 265 [73 Am. Dec. 658], settle the question of the sufficiency of the interest to disqualify.

The judgment is affirmed.

FIELD, C. J., and NORTON, J., concurred.

RATIFICATION BY CORPORATION MUST BE MADE WITH FULL KNOWLEDGE OF MATERIAL FACTS: *Hoffman Steam Coal Co. v. Cumberland Coal and Iron Co.*, 77 Am. Dec. 311, note 323; *Williams v. Christian Female College*, Id. 569, note 572. The principal case is cited to the point that it must be shown by the party asserting the ratification that the resolution or acts of the corporation or of their directors or trustees relied on as constituting the ratification, were performed with a full knowledge of all the material facts necessary to an understanding of their rights: *Dabney v. Stevens*, 10 Abb. Pr., N. S., 49.

CORPORATION CANNOT BE BOUND BY CONTRACT MADE BY ITS PRESIDENT, unless power to bind it is given to him by the act of incorporation, or he is authorized by the corporation to make the contract: *Turnpike Road Co. v. Looney*, 71 Am. Dec. 491, note 493. But he may without express authority perform such acts and duties in regard to the ordinary affairs of the corporation as custom has imposed upon or necessity requires of the president of a corporation: *Chicago etc. R. R. Co. v. Coleman*, 68 Id. 544, note 546.

PRESIDENT OF CORPORATION, IF NOT STOCKHOLDER, IS COMPETENT WITNESS for the corporation, but stockholders are not: *National Fire Ins. Co. v. Crane*, 77 Am. Dec. 289, note 295.

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## KENYON v. WELTY.

[20 CALIFORNIA, 687.]

PURE MISTAKE OF LAW UNATTENDED WITH MISREPRESENTATIONS, UNDUE INFLUENCE, MISPLACED CONFIDENCE, or other special circumstances of a similar character, is not ground for equitable relief against a contract. CONTRACT ENTERED INTO UNDER MUTUAL BELIEF OF PARTIES THAT LAW OF SUBJECT-MATTER was established by a decision of the supreme court, will not be set aside in equity because of a subsequent decision of the same court overruling the former one, and declaring a different rule upon the subject.

ACTION to set aside contract. The opinion states the case.

*George R. Moore*, for the appellant.

*J. W. Winans*, for the respondent.

By Court, NORTON, J. The controlling facts in this case are these: The defendant Welty purchased a piece of land in the city of Sacramento at sheriff's sale, under an execution issued upon a judgment rendered by the superior court of the city of San Francisco against one C. L. Ross, who was the owner of the land. Welty conveyed a portion of the land so purchased to one Morris Nolan, who executed a mortgage upon it to the plaintiff Kenyon, as security for a loan of one thousand dollars. Afterwards, Welty procured a conveyance from Ross of all his title to the premises so bought at the sheriff's sale, and including the portion sold to Nolan, and by him mortgaged to Kenyon. Shortly after the purchase, the decision of the su-



preme court of this state was made, in the case of *Meyer v. Kalkmann*, 6 Cal. 582, that the superior court of the city of San Francisco had no jurisdiction to issue process to run outside the limits of the city of San Francisco. After this decision, an agreement was entered into between Kenyon and Welty, in pursuance of which Kenyon transferred to Welty the mortgage of Nolan, in consideration of Welty's procuring a deed from his brother, in whom the title from Ross had become vested, to Kenyon, of a portion of the premises covered by the mortgage, and which portion was to be discharged from the lien of the mortgage. Some time after this agreement was carried into effect, the supreme court, in the case of *Hickman v. O'Neal*, 10 Id. 292, overruled the former decision in the case of *Meyer v. Kalkmann*, 6 Id. 582. This action is brought to have this agreement set aside, upon the ground that it was made under a mutual mistake of the parties.

In the case of *Goodenow v. Ewer*, 16 Cal. 461 [76 Am. Dec. 540], this court, speaking of mistakes of law, says: "Indeed, the weight of authority in the United States is, that the mistake, unless accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence, constitutes no ground of relief." The court then quotes: "It may be safely affirmed," says Mr. Justice Story, "upon the highest authority, as a well-established doctrine, that a mere naked mistake of law, unattended with any such special circumstances as have been above suggested, will furnish no ground for the interposition of a court of equity; and the present disposition of courts of equity is to narrow rather than to enlarge the operation of exceptions."

The only mistake that existed in this case, if there was any mistake, was one of law. The parties supposed that the Nolan mortgage was invalid, and that the title derived through the conveyance from Ross was valid. But this supposition rested wholly upon their supposition as to the condition of the law. They knew what the law was before the decision in the case of *Meyer v. Kalkmann*, 6 Cal. 582, and they knew of that decision, and they exercised their judgment as to the effect of that decision. There was no mistake or want of knowledge as to any fact that now appears in the case. Under the rule laid down in the case of *Goodenow v. Ewer*, 16 Id. 461 [76 Am. Dec. 540], this is therefore not a case in which relief can be granted, unless it be characterized by some special circumstance of the nature above suggested as constituting an exception.

The plaintiff insists that such circumstances are found in the fact that the title on which the Nolan mortgage rests was derived from the defendant Welty, and that he informed Kenyon, through the latter's agent, that the title was good when Kenyon was about to take the mortgage. We should have great difficulty in saying, from anything we find in the facts of this case, that Welty would be under any obligation, legal or equitable, to make good the Nolan mortgage, if even the title had not been good. But in fact, the title on which the Nolan mortgage rests, it appears, was good then and is now. The loss that the plaintiff has sustained is the result of the mistake as to the condition of the law, and as a consequence, as to the condition of the title at a subsequent period, and depending upon a matter which subsequently arose, to wit, the decision in the case of *Meyer v. Kalkmann*, 6 Cal. 582. The agreement which is now sought to be annulled was not induced by anything said or done by Welty; but on the contrary, was, in some degree, extorted from him against his will. It was the result of a speculation upon, that is, the opinion of the parties as to the effect of a decision of this court,—in short, a pure mistake of law.

To establish the doctrine that all contracts made under a condition of the law, as expounded by the supreme court of the state, can be set aside if the court subsequently changes its opinions or corrects its error, would be attended with very serious evils. What amount of confusion and litigation would arise in the city of San Francisco alone, if all contracts and conveyances, and transfers of possession, which were made under the supposed effect of decisions of this court as to titles in that city, could now be repudiated and set aside, in consequence of those decisions having been overruled or modified! Upon this subject Chancellor Kent, in the case of *Lyon v. Richmond*, 2 Johns. Ch. 59, says: "Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind; and to permit a subsequent judicial decision in any one given case on a point of law to open or annul everything that has been done in other cases of the like kind for years before under a different understanding of the law, would lead to the most mischievous consequences.

It is insisted that the court below has found as a fact that the contract in question was made under a mutual mistake of fact as to the title; and as there was no motion for a new trial,

it must be taken that the mistake in this case was one of fact, and not of law. But the meaning of a particular expression in a finding must be considered in reference to the whole finding; and in this case there is no doubt that the meaning here is that the mistake as to the title was not as to any fact affecting the title, but as to the law affecting the title.

We have assumed, in the consideration of this case, that it was a mistake to suppose the law to be as decided in the case of *Meyer v. Kalkmann*, 6 Cal. 582, during the period that elapsed before that decision was overruled, because, for the purpose of this decision, it was not necessary to take a different view; but we do not intend to express any views upon the point.

The judgment must be reversed, and the court below directed to dismiss the complaint.

FIELD, C. J., and COPE, J., concurred.

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EQUITY WILL NOT RELIEVE FROM MISTAKE OF LAW, unless special circumstances, such as undue influence, misrepresentation, or misplaced confidence, are shown: *Boggs v. Fowler*, 76 Am. Dec. 561, note 567; *Goodenow v. Ewer*, Id. 540, note 550. The principal case is cited to the point that *ignorantia legis neminem excusat*, in *Christy v. Sullivan*, 50 Cal. 339, S. C., 19 Am. Rep. 655, where it is held that one who purchases from another county warrants drawn by the auditor on the treasurer, which show on their face that they were issued in violation of law, and do not constitute a charge on the treasury, is presumed to know the law; and if there is no fraud or misrepresentation on the part of the seller, the purchaser cannot recover from him the money paid.

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## FALLON v. BUTLER.

[21 CALIFORNIA, 24.]

ACTION WILL LIE TO FORECLOSE MORTGAGE AGAINST ESTATE OF DECEDENT MORTGAGOR, although the debt secured by the mortgage has been presented and duly allowed, but no judgment can be entered up for any deficiency which may remain after the application of the proceeds of the sale.

PROVISION OF CALIFORNIA ACT REGULATING SETTLEMENT OF ESTATES OF DECEDENTS, declaring that no sale of any property of an estate shall be valid unless made upon an order of the probate court, is applicable to sales by executors and administrators only, and does not refer to judicial sales under decrees of court, nor to sales in pursuance of testamentary authority.

ALLEGATION OF PRESENTMENT OF CLAIM IS UNNECESSARY, in an action to enforce specific liens and equitable rights against an estate, *semble*.

**TERM "CLAIMS," AS USED IN CALIFORNIA ACT REGULATING SETTLEMENT OF ESTATES OF DECEDENTS,** refers only to such debts or demands against the decedent as might by action be reduced to simple money judgments, and does not embrace mortgage liens.

**THE** opinion states the facts.

*Hoge and Wilson*, for the appellants.

*Delos Lake*, for the respondent.

By Court, FIELD, C. J. This is an action for the foreclosure of a mortgage executed on the 27th of February, 1856, by David C. Broderick, late of the city of San Francisco, upon certain real property situated within that city, to secure his promissory note of the same date for ten thousand dollars, payable in twelve months, with interest. Broderick died on the 16th of September, 1859, and the action is brought against the executors of his last will and testament, and parties claiming some interest in the mortgaged premises as devisees, legatees, purchasers, or otherwise, subsequent to the lien of the mortgage. The complaint alleges the probate of the will, and the issuance of letters testamentary to the defendants, Butler and McGlynn, the executors named therein; the presentation of the promissory note, verified as required by statute, to them, as such executors, for the approval and allowance as a claim against the estate of the deceased, and its approval and allowance by them, and subsequently by the probate judge of the county; and prays for the usual decree for the sale of the premises, and the application of the proceeds to the payment of the amount found due upon the note for principal and interest, and for the costs and percentage stipulated. There is no prayer for judgment or execution for any deficiency which may remain after the application of the proceeds of the sale. The plaintiff obtained a decree pursuant to his prayer.

The objection taken by the appellants is to the jurisdiction of the district court to entertain the action. It is founded upon certain provisions of the "act regulating the settlement of the estates of deceased persons," and the decisions in this court in *Ellissen v. Halleck*, 6 Cal. 386, and *Falkner v. Folsom*, Id. 412.

The provisions of the act referred to are those which declare that no sale of any property of an estate shall be valid unless made upon an order of the probate court (sec. 148); that no action shall be maintained upon any claim against an estate unless the claim has been presented to the executor or admin-

istrator and been rejected by him, or if approved by him, has been rejected by the probate judge of the county (secs. 134, 136); that a claim allowed by the executor or administrator and probate judge shall be ranked among the acknowledged debts of the estate, to be paid in due course of administration (sec. 133); and that the effect of a judgment rendered against an executor or administrator upon a claim for money against the estate of the testator or intestate, shall be only to establish the claim in the same manner as if it had been allowed by the executor or administrator and probate judge (sec. 140). These provisions, it is contended, divest the district court of jurisdiction to entertain the action for the foreclosure of the mortgage, and place the debt to the plaintiff allowed by the executors and probate judge among the simple money demands against the estate of the testator, to be paid in the due course of administration, and the sale of the property mortgaged subject to the exclusive jurisdiction of the probate court. The only advantage which the plaintiff possesses by his mortgage, according to the position of the appellants, over the holder of an unsecured money demand against the estate is this: that in case the funds in the hands of the executors are insufficient to pay all the debts of the testator, he can insist upon an appropriation of the proceeds arising from the sale of the mortgaged premises to the payment of his demand in preference to the claims of other creditors.

In the case of *Ellissen v. Halleck*, 6 Cal. 386, there was no presentation of the claim arising upon the personal obligation of the mortgagor to the executors for allowance, and the court held that such presentation and the rejection of the claim by them, or by the probate judge, were essential to the maintenance of the action for the foreclosure of the mortgage. In *Falkner v. Folsom*, Id. 412, the claim was presented to the executors and allowed by them, and the court held the allowance gave to the claim "all the virtues and properties which a judgment against executors can have under our system"; and that there was in consequence no necessity for the action. In *Ellissen v. Halleck*, *supra*, there was a prayer in the complaint that the executors be adjudged to pay any deficiency which might remain after the application of the proceeds of the sale out of other assets of the estate of the deceased. In *Falkner v. Folsom*, *supra*, there was a prayer that such deficiency be classed among the demands against the estate, and the executors be directed to pay the same in the due course of adminis-

tration. In neither case did the court distinguish between the claims arising upon the personal obligations of the mortgagors and the right of the mortgagees to seek the aid of a court of equity to enforce their specific liens. Yet the distinction is obvious, and has been, tacitly at least, recognized in later cases. The decisions, therefore, of those cases never met the full approbation of the profession; and as titles to property amounting in value to millions rest upon sales under decrees of the district court in cases instituted for the foreclosure of mortgages made by deceased persons, we are justified in reconsidering the question of the jurisdiction of that court in such cases.

The provision of the statute declaring that no sale of any property of an estate shall be valid, unless made upon an order of the probate court, applies only to sales by executors and administrators. It has no reference to judicial sales under the decrees of the district courts, nor to sales in pursuance of testamentary authority: *Cowell v. Buckelew*, 14 Cal. 641; *Norris v. Harris*, 15 Id. 256; *Payne v. Payne*, 18 Id. 292. The question then for consideration is, whether a mortgage lien is a "claim against the estate" of a deceased person, within the meaning of the probate act, so as to preclude an action for its enforcement until the debt secured by it has been presented to the executors, and been rejected by them or by the probate judge.

As we have seen, the statute declares that a claim allowed shall be ranked among the acknowledged debts of the estate, to be paid in the due course of administration: Sec. 133. Other provisions treat a claim as synonymous with a debt, or a legal demand for money. Notice is to be given "to creditors of the deceased requiring all persons having claims against the deceased to exhibit them": Sec. 128. "Every claim presented to the administrators shall be supported by the affidavit of the claimant that the amount is justly due; that no payments have been made thereon; and that there are no offsets to the same to the knowledge of the claimant": Sec. 131. When any claim is only allowed in part by the administrator, executor, or probate judge, "he shall state, in his indorsement, the amount he is willing to allow": Sec. 139. "If the executor or administrator is himself a creditor of the testator or intestate," his claim shall be presented, duly authenticated, for allowance or rejection to the probate judge: Sec. 145. In the statements to be returned by the executor or ad-

ministrator, "he shall designate the names of the creditors, the nature of each claim, when it became due, or will become due, and whether it was allowed or rejected by him": Sec. 147. "If claims against the estate have been allowed, and a sale of property shall be necessary for their payment, or of the expenses of the administration," the executor or administrator may apply for an order to sell so much of the personal property as may be necessary: Sec. 150. If an executor or administrator "shall have paid any claim for less than its nominal value," he shall only be entitled to charge in his account so much as he shall have actually paid: Sec. 220. Other provisions equally pertinent might be cited. Whatever signification, then, may be attached to the term "claims," standing by itself, it is evident that in the probate act it only has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered. In this sense, a mortgage lien is not a claim against the estate. In its enforcement, a money judgment is not sought, but a subjection of the property to sale, and the application of the proceeds to the payment of the debt secured. The debt secured may or may not be a personal liability. Whether it be so or not, it is distinct from the mortgage lien. In the present case, the debt is evidenced by the promissory note of the mortgagor, and the complaint alleges, as we have stated, its presentation and allowance as a claim against the estate. Such presentation and allowance were necessary to secure the payment of the debt out of the general estate, if that were desired, and perhaps, also, to prevent the debt from being barred by the statute, and thus to uphold the mortgage. But no judgment is asked against the estate, either for the debt or any part of it. The sole object sought is to reach the property mortgaged, and subject it to sale, and have the proceeds applied to the payment of the debt. The action is in the nature of a proceeding *in rem*. "A bill of foreclosure," says Mr. Chancellor Kent, "is for a specific performance of the mortgage contract, by passing the whole title of the mortgagor to the plaintiff, or the purchaser under the decree, and it is precisely a suit *in rem*. The whole object of the suit is the remedy by foreclosure or sale of the mortgaged premises, and it is, therefore, within the reason of the cases which speak of a suit concerning the title and possession of the land itself": *Kershaw v*



*Thompson*, 4 Johns. Ch. 616; see also *Nagle v. Macy*, 9 Cal. 429.

If the position of the appellants — that a mortgage lien is a claim within the meaning of the probate act, and cannot therefore be enforced by action when the demand secured by it is allowed by the executor or administrator and probate judge — were tenable, great inconvenience, and in numerous instances manifest injustice, would follow. If it be tenable at all, it must hold good, as counsel observes, in all cases, for the statute makes no exceptions. If true, it applies not merely to a case where the mortgagor is deceased, but where the equity of redemption was owned by the decedent, and to the case of a dry, naked mortgage with no personal liability. Thus, to adopt the illustrations given by counsel, if a mortgagor convey the equity of redemption and then die, no action can be maintained to foreclose the mortgage, because the representatives of the deceased mortgagor can only be proceeded against in the probate court. Or if the lands of the decedent are encumbered by a mortgage of his grantor, no action will lie for the foreclosure of the mortgage, because the right to subject the real property of the deceased to sale is a claim against the estate. Numerous other instances might be given showing equal inconvenience following the position asserted. It is clear to our minds that the legislature never intended to give to the statute such an extended operation; but that in the use of the term "claims" it intended to embrace only such demands or liabilities as might by action be reduced to simple money judgments, and to leave the enforcement of specific liens and equitable rights to the ordinary proceedings in the district courts. In the case of mortgages it must often happen — where there are subsequent encumbrances, or the property has gone through numerous transfers — that complete justice can only be done to the different parties asserting interests, or a good title given upon the sale, through an equitable action.

Judgment affirmed.

COPE and NORTON, JJ., concurred.

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PRESENTATION OF CLAIMS AGAINST ESTATE OF DECEDENT, and allowance or rejection thereof: See *Henderson v. Hsley*, 49 Am. Dec. 41; *Dean v. Dufeld*, 58 Id. 108; *Carriger v. Whittington*, 72 Id. 212; effect of allowance of claim: *Moore v. Hillebrand*, 65 Id. 118, 121, note; *Kennerly v. Shepley*, 57 Id. 212.

**WHAT CLAIM NEED NOT BE PRESENTED FOR ALLOWANCE:** *Vandever v. Freeman*, 70 Am. Dec. 391.

**THAT CLAIM SECURED BY MORTGAGE** need not be presented against estate of deceased mortgagor, see *Putnam v. Russell*, 42 Am. Dec. 478.

**PRESENTATION OF CLAIM TO ADMINISTRATOR IS SUFFICIENT**, under California statute, to stop the running of the statute of limitations: *Beckett v. Selover*, 68 Am. Dec. 237.

**THE DOCTRINE OF THE PRINCIPAL CASE**, as to the jurisdiction of district court to entertain action for foreclosure of mortgages upon the estates of deceased persons, affirmed in *Pechaud v. Riquet*, 21 Cal. 76; *Willis v. Farley*, 24 Id. 449; *Matter of Orr*, 29 Id. 104; *Brown v. Orr*, Id. 122. Debts secured by mortgage should be presented to the legal representative and the probate judge for allowance, in order to secure their payment out of the general estate of decedent, and to prevent them from being barred by the statute: *Willis v. Farley*, 24 Id. 498; *Pitte v. Shipley*, 46 Id. 158, citing the principal case; and as to this point it is commented on in *Sichel v. Carrillo*, 42 Id. 505. See also *Hibernia Sav. etc. Soc. v. Hayes*, 56 Id. 306, dissenting opinion of McKee, J. It is likewise commented on and doubted as to the construction given to the word "claim" in the one hundred and thirty-first section of the probate act, in *Ellis v. Polhemus*, 27 Id. 354; but see Id. 356, remarks of Rhodes, J., in concurring opinion. So the definition of the word "claim" given in the principal case is adopted and approved in *Estate of McCausland*, 52 Id. 577. The principal case is cited in *Corbett v. Rice*, 2 Nev. 332, to the point that the one hundred and forty-eighth section of the California probate act was intended to prohibit only executors and administrators from selling on their own responsibility, without the order of the probate court, and did not prohibit judicial sales, if otherwise properly authorized; and is cited in Id. 333, as assuming that no action at law should be maintained on an allowed claim. In Id. 338, dissenting opinion of Lewis, C. J., the authority of the principal case as to the distinction between secured and unsecured debts is said to have been very much weakened by the more recent decision in *Ellis v. Polhemus*, 27 Cal. 350. See *Hibernia Sav. etc. Soc. v. Hayes*, 56 Id. 297, as to the effect of the repeal of the provision in section 1500 of the Code of Civil Procedure, which authorized suits upon mortgages to be maintained against the estate of a deceased person subject thereto, etc.

## MONTGOMERY v. MIDDLEMISS.

[21 CALIFORNIA, 103.]

**DECREE IN ACTION TO FORECLOSE MORTGAGE CONCLUDES RIGHTS OF ALL PARTIES TO ACTION**, and the sale thereunder, consummated by the sheriff's deed, passes, as against them, the entire estate held by the mortgagor at the date of the mortgage.

**AS AGAINST PARTIES TO FORECLOSURE SUIT, PURCHASER AT FORECLOSURE SALE IS ENTITLED**, upon the receipt of his deed, to the possession of the premises, and to the aid of the court in enforcing its delivery; and the right to this aid is not affected by the fact, that, pending the action, the plaintiff may have executed to one of the parties defendant a conveyance of the whole or a part of the premises embraced in the decree.

**PURCHASER AT SALE UNDER DECREE OF FORECLOSURE OF MORTGAGE IS ENTITLED TO WRIT OF ASSISTANCE**, although such decree does not direct the delivery of possession, and although at the time of the application no preliminary order for such delivery has been made by the court.

**TO OBTAIN WRIT OF ASSISTANCE AGAINST PARTIES TO FORECLOSURE**, and those claiming with notice under them after commencement of suit to foreclose, it is only requisite to furnish the court proper evidence of a presentation of the deed to them, a demand of the possession, and their refusal to surrender.

ACTION to foreclose a mortgage, respondent Middlemiss being made a party defendant. Pending the action, plaintiff quitclaimed to Middlemiss a part of the mortgaged premises, and afterward a final decree for the sale of the whole of the mortgaged premises was rendered, under which a sale was had, and thereat plaintiff became the purchaser. The statutory time having elapsed without a redemption, plaintiff obtained a sheriff's deed for the premises, embracing the part previously quitclaimed to Middlemiss. He exhibited his sheriff's deed to the latter, who was occupying the land quitclaimed to him, and demanded from him the possession, which was refused. Thereupon, plaintiff applied to the court for a writ of assistance, which the court denied, and plaintiff appealed.

*George Cadwallader*, for the appellant.

*Belcher and Belcher*, for the respondent.

By Court, FIELD, C. J. It is impossible to perceive, from the facts disclosed by the transcript before us, what effect, if any, the quitclaim deed of the mortgagee had upon the rights of Middlemiss. It was executed during the pendency of the action for the foreclosure of the mortgage, and if available for any purpose, it should have been in some form presented to the consideration of the court, before the decree for the sale of the entire premises was entered. The decree concluded the rights of the parties to the action, and the sale under it, consummated by the sheriff's deed, passed, as against them, the entire estate held by the mortgagor at the date of the mortgage. As against them, the purchaser was entitled, upon the receipt of his deed, to the possession of the premises, and if necessary, to the aid of the court in enforcing its delivery.

It is urged by the respondent, in support of the order refusing the writ of assistance, that the decree did not contain any direction to deliver the possession to the purchaser, and that no preliminary order for such delivery was made by the court; and as sustaining the objection, the case of *Montgomery v.*

*Tutt*, 11 Cal. 193, is cited. In that case we referred to the steps required under the old chancery practice to obtain the writ, and observed that "in our system the order to deliver possession should be first made, unless a direction to that effect is contained in the decree, and if upon its service that is disregarded, the court can at once direct the writ to issue. If delivery of possession to the purchaser is directed by the decree, no preliminary order will be requisite; but upon proof of disobedience to the decree, the party will be entitled, as a matter of course, to the writ as against the defendants in the suit." Upon further consideration of the subject in later cases, we have come to the conclusion that the preliminary order may be omitted, even where no direction for the delivery of possession is contained in the decree. The legal effect of the decree is the same without the direction: *Horn v. Volcano Water Co.*, 18 Id. 141. All that is requisite to obtain the writ, as against the parties and those claiming with notice under them after the commencement of the action, is to furnish to the court proper evidence of a presentation of a deed to them, and a demand of the possession, and their refusal to surrender it.

It follows that the order of the district court refusing the writ must be reversed, and that court directed to issue the writ pursuant to the petition of the plaintiff; and it is so ordered.

NORTON, J., concurred.

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WRIT OF ASSISTANCE, AND ISSUE OF, IN AID OF PURCHASER AT FORECLOSURE SALE: *Wilson v. Polk*, 51 Am. Dec. 151, 154, note.

DUTY OF SHERIFF IN EXECUTING WRIT OF ASSISTANCE: *Chapman v. Thornburgh*, 76 Am. Dec. 571.

THE DOCTRINE OF THE PRINCIPAL CASE in reference to the issuance of writs of assistance is affirmed and followed, in *Montgomery v. Byers*, 21 Cal. 107; also in *Langley v. Voll*, 54 Id. 437; and the principal case is cited to the point that the rights of parties to foreclosure suit are cut off by the decree, and that the sale under it, consummated by the sheriff's deed, passes, as against them, the entire estate held by the mortgagor at the date of the mortgage, in *Grattan v. Wiggins*, 23 Id. 36.

## FRINK v. MURPHY.

[21 CALIFORNIA, 103.]

**JUNIOR MORTGAGEE HAS RIGHT TO REDEEM UNDER STATUTE**, when not made party to suit to foreclose prior mortgage, and he also retains his equitable right to redeem unaffected by the foreclosure. If made a party to the foreclosure suit, his equitable right to redeem is barred, but he is still a redemptioner under the statute.

**ALTHOUGH DECREE IN FORECLOSURE SUIT ASCERTAINS AMOUNT OF JUNIOR ENCUMBRANCEE'S LIEN**, and directs its payment out of any surplus remaining after satisfaction of the prior lien, his statutory right to redeem still exists as to any portion of his demand not satisfied by the application of such surplus.

**PHRASE "ON WHICH THE PROPERTY WAS SOLD," IN CALIFORNIA PRACTICE ACT, SECTION 230**, has reference to the lien which the action was brought to enforce, and does not apply to the liens of subsequent encumbrancers who are made parties.

**THE** opinion sufficiently states the facts.

*L. Archer*, for the appellant.

*John H. Moore*, for the respondent.

By Court, NORTON, J. This is an application for a *mandamus* to compel the defendant to execute a conveyance of certain property sold by him as sheriff, etc. The application is contested upon the ground that the property has been redeemed, and the question is, whether the persons claiming to have redeemed it are redemptioners within the meaning of the statute. The sale was made under a judgment of foreclosure, and the persons redeeming are assignees of one Kealy, who was a junior mortgage creditor, and a party to the foreclosure suit. The decree of foreclosure ascertained the amount due to Kealy on his mortgage, and directed the proceeds of the sale, after paying the plaintiff's demand, to be applied to the demand of Kealy, and a small sum was so applied, leaving, however, a large portion of Kealy's demand unsatisfied.

The embarrassment in this case is occasioned by a decision of this court and subsequent statutory regulations applying the right of redemption from ordinary judgment sales to sales under a decree for the foreclosure of a mortgage. Aside from statutory regulations, a sale under a judgment gave the purchaser an indefeasible title as against any subsequent encumbrancers. By statute, a certain time was allowed to such encumbrancers to redeem from such a sale. But by a sale under a decree of foreclosure, the rights of no persons were affected who were not made parties to the action; but the

rights of all who were so made parties were ascertained and provided for, and the subsequent encumbrancers were after such sale barred and foreclosed of all equity of redemption. As under our system, as now regulated, a right of redemption is given to subsequent encumbrancers from sales on foreclosure as well as on ordinary judgments, it would render the system more consistent if the same effect should be attributed to a sale under a decree of foreclosure as under an ordinary judgment; that is, that it should give a good title against all subsequent encumbrancers, although not made parties, who did not redeem under the statute. But it has been repeatedly decided by this court that such encumbrancers were not out off from their general right to redeem, unless made parties. In case, then, a subsequent encumbrancer is not made a party to a foreclosure suit, he has the right to redeem under the statute, and also his general right to redeem unaffected by the foreclosure. The second subdivision of section 230 of the civil practice act gives a right of redemption to a creditor having a lien subsequent to that on which the property was sold. Ordinarily, in this state, in an action to foreclose a mortgage, subsequent encumbrancers, as well by mortgage as by judgment, are made parties by a general averment that they have some claim or lien, and the decree makes no provision for their benefit, but bars and forecloses them from their general right of redemption. In such cases, there can be no doubt that such subsequent encumbrancers may redeem under the statute, as they are embraced within the letter of its provisions. But in the present case, the amount due to Kealy as a subsequent mortgagee was fixed by the decree, and the proceeds of the sale directed to be applied on his mortgage next in order after the mortgage of the plaintiff in that action, and a portion of the proceeds were in fact applied on Kealy's mortgage. Under these facts, must it be held that the property was sold under Kealy's mortgage as well as under the mortgage which the action was specially instituted to foreclose? If so, then Kealy's assignees do not come within the letter of the statute, nor, perhaps, within its spirit. Strictly, it may be said that the property was sold on Kealy's mortgage, since the proceeds were applied, after paying the plaintiff's claim, on his mortgage; but to hold that the expression, "on which the property was sold," can apply to any other lien than that which the action was brought to enforce, would lead to uncertainty and embarrassment in applying the right of redemption under the

statute. Instead of having the simple criterion of the date of the successive liens as a guide, the terms of the decree would have to be consulted in order to see if the proceeds were directed to be applied on any and which of the subsequent liens. The legislature could not have reasonably intended such a criterion, and we should not so interpret the statute unless its terms peremptorily require it.

Considering the whole system of redemption as affected by our statutes, we think the phrase "on which the property was sold" must be held to refer to the lien which the action was brought to enforce, and that it does not apply to the liens of subsequent encumbrancers who are made parties. The result is that the assignees of Kealy had the right to redeem on their lien for the unpaid balance of the Kealy mortgage.

The order refusing a *mandamus* is affirmed.

FIELD, C. J., and COPE, J., concurred.

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**FORECLOSURE AND SALE OF MORTGAGED PREMISES DO NOT AFFECT RIGHT OF REDEMPTION OF GRANTEE OF MORTGAGOR** who was not made a party to the proceedings: *Childs v. Childs*, 75 Am. Dec. 512.

**SUBSEQUENT ENCUMBRANCES, NOT MADE PARTIES TO FORECLOSURE SUIT,** are not bound by the decree, and their right to redeem is not barred: *Eldridge v. Wright*, 55 Cal. 533; *Haskell v. State*, 31 Ark. 100, citing principal case.

**THE PRINCIPAL CASE IS DISTINGUISHED** in *Black v. Gerishton*, 58 Cal. 58.

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## **SHERBOURNE v. YUBA COUNTY.**

[21 CALIFORNIA, 113.]

**QUASI CORPORATION IS NOT LIABLE FOR ACTS OF OFFICERS OR EMPLOYEES WHICH IT APPOINTS**, in the exercise of a portion of the sovereign power of the state by requirement of a public law, solely for the public benefit, and for a purpose from which such corporation derives no benefit.

**COUNTY INCURS NO LIABILITY FOR DAMAGES TO INMATE OF COUNTY HOSPITAL**, who sustains injuries from unskillful treatment by the resident physician, or from the failure on the part of the officers of the hospital to supply sufficient and wholesome food.

**THE facts are sufficiently stated in the opinion.**

*O. E. De Long*, for the appellant.

*F. L. Hatch*, district attorney, for the respondent.

By Court, **NORTON, J.** The plaintiff in this action seeks to recover compensation from the county of Yuba for the damage which he sustained by reason of the unskillful treatment he



received from the resident physician, and the insufficient and unwholesome food and other necessities supplied him while in the county hospital as an indigent sick person.

A demurrer to the complaint was sustained by the court below, and from the judgment the plaintiff has appealed.

The plaintiff insists that the county is required by law to provide for its indigent sick in a suitable manner, and is liable to an action for the misfeasance of its employees. No case has been cited to us in which such an action has been sustained; nor do we think this action can be sustained upon principle. Private corporations and municipal corporations may be liable for the acts of their employees, of whom they have the appointment and supervision, and when the duty to be performed is for the benefit of the corporation. But a *quasi* corporation, like a county, is not liable for the acts of officers or employees which it appoints in the exercise of a portion of the sovereign power of the state, by the requirements of a public law, and simply for the public benefit, and for a purpose from which the county, as a corporation, derives no benefit: *Fowle v. Common Council of Alexandria*, 3 Pet. 398; *Mayor etc. of N. Y. v. Bailey*, 3 Hill, 531 [38 Am. Dec. 669], S. C. affirmed, 2 Denio, 433, and cases cited by Senator Hand, at pages 447, 448.

Judgment affirmed.

FIELD, C. J., and COPE, J., concurred.

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SUBJECT OF LIABILITY OF QUASI CORPORATIONS, whose corporate powers are conferred for the benefit of the public at large, discussed: See *Savage v. Banger*, 63 Am. Dec. 658; *Browning v. City of Springfield*, Id. 345; *Commissioners v. Martin*, 69 Id. 333; *Lorillard v. Town of Monroe*, 62 Id. 120; *Eastman v. Meredith*, 72 Id. 302.

LIABILITY OF MEMBERS OF QUASI CORPORATIONS FOR DEBTS: See *Freeland v. McCullough*, 43 Am. Dec. 694, note.

LIABILITY OF QUASI CORPORATION FOR ACT OF MOB: *Prather v. City of Lexington*, 56 Am. Dec. 585, 589, note.

THE PRINCIPAL CASE IS CITED in support of the general rule that counties are not liable for the negligence of their agents and servants, in *Crowell v. Sonoma County*, 25 Cal. 315; *Symonds v. Clay County*, 71 Ill. 357; and is cited to the point that a city is not liable in damages to a non-paying patient at the city hospital for injuries resulting from the negligence and misfeasance of the officers and servants of that institution, in *Martough v. City of St. Louis*, 44 Mo. 481.

## BAUM v. GRIGSBY.

[21 CALIFORNIA, 172.]

**VENDOR'S LIEN, AFTER ABSOLUTE CONVEYANCE, IS NOT SPECIFIC, ABSOLUTE CHARGE UPON PROPERTY, but only an equitable right of the vendor to resort to it in case the purchase-money is not paid.**

**EQUITABLE LIEN WHICH VENDOR OF LAND RETAINS, AFTER ABSOLUTE CONVEYANCE, for the unpaid purchase-money, is not assignable.**

**VENDOR'S LIEN FOR PURCHASE-MONEY OF LAND IS NOT WAIVED, in absence of express agreement to that effect, by the fact that he takes the note or other personal security of the vendee for the money; but is waived by the taking of a distinct and independent security, unless there is at the time an express agreement for its retention.**

**DEFINITION BETWEEN LIEN OF VENDOR AFTER ABSOLUTE CONVEYANCE, and lien of vendor when contract of sale is unexecuted, stated.**

ONE Hill sold, and by a deed absolute in form conveyed, to defendant certain land, taking in part payment of the purchase-money the latter's negotiable promissory note. Hill indorsed the note to plaintiff, who brought this action to recover the amount due thereon, and also to establish a vendor's lien upon the premises, and to subject them to sale for the satisfaction of the debt. Judgment for the plaintiff, and defendant appealed.

*W. C. Wallace and T. J. Tucker, for the appellant.*

*Hartson and Stoney, for the respondent.*

By Court, FIELD, C. J. The doctrine that a vendor of real property, after an absolute conveyance, retains an equitable lien for the unpaid purchase-money, prevails in England and in nearly all the states of the Union. The difference of opinion in the numerous cases upon the subject in the courts of this country relates principally to the character of the lien, and to the question whether it passes with a transfer of the claim of the vendor for the purchase-money. The lien, it is conceded, is not waived, in the absence of express agreement to that effect, by the fact that the vendor takes the note or other personal security of the vendee for the money. Such personal security is considered as only intended to meet and overcome the acknowledgment of the receipt of the money in the deed. On the other hand, when any other independent security is taken,—as a mortgage on the land, or upon other property, or the personal responsibility of a third person,—the lien is held to be waived, unless there is at the time an express agreement for its retention. The taking of a distinct, independent security is presumptive evidence of the waiver.

The fact, therefore, that the vendee in the present case gave his negotiable promissory note to the vendor for a portion of the purchase-money, in no respect affects the equitable lien of the latter. The question presented is, whether that lien passed to the plaintiff with the indorsement of the note to him. There was no attempt made to assign specially the lien; its assignment is asserted from the simple transfer of the note.

The question, upon the authorities, is clearly with the appellant. Indeed, with the exception of decisions in two or three states, the adjudged cases are uniformly against any assignment of the lien by a transfer of the note or other personal security of the vendee. "I am not aware of any case," says Chancellor Walworth, "where the assignee of the note or the security has been permitted to sustain such a claim on an implied agreement to assign the lien": *White v. Williams*, 1 Paige, 506. "I do not find in the English books," says Mr. Justice Nesbit of the supreme court of Georgia, "a single case in which it [the lien] has been enforced in favor of the assignee of the note for the purchase-money": *Wellborn v. Williams*, 9 Ga. 89 [52 Am. Dec. 427].

The cases which deny that the lien passes with the personal security of the vendee do not rest, except in a few instances, upon the want of a special assignment from the vendor, but upon the ground that the lien is in its nature unassignable; and to that conclusion we have arrived. The lien is not a specific, absolute charge upon the property. It is simply a right to resort to the property upon a failure of payment by the vendee. It does not arise from any agreement of the parties, but is the creature of equity, and is established solely for the security of the vendor. It is founded upon the natural justice of allowing a party to reach the property which he has transferred, to satisfy the debt which constitutes the consideration of the transfer. It is, therefore, the personal privilege of the vendor. The assignee of a note given for the purchase-money stands in a very different position. He has not parted with the property which he seeks to reach, in consideration of the note he has received. He has never held the property, and has, therefore, no special claims upon equity to subject it to sale for his benefit. The particular equity of the vendor in this respect cannot, in the nature of things, be asserted by another. "It is indispensably necessary," says Chancellor Bland, "to the existence of such a lien that the parties should stand in the relation towards each other of vendor and vendee of real

estate, the purchase-money of which has not been fully paid. If that relationship is, in any manner whatever, put off, altered, or relinquished, an equitable lien either cannot arise, or will be destroyed. The pure relationship of creditor and debtor, or of borrower and lender, is incompatible with the existence of an equitable lien, excludes or extinguishes it." And again: "An equitable lien is an encumbrance upon land, which can only be held by a vendor; and although assets may be marshaled so as to put a vendor altogether upon his equitable lien, for the benefit of other creditors, yet no third person can, as assignee of the vendor, derive any benefit from such a lien; nor can it, like a bond or mortgage, be assigned, because it is not expressed in writing or in any separate contract, but exists only as an inseparable equitable incident of the contract of purchase, and is raised by construction of equity in favor of the vendor only. To allow it to pass by an assignment of the claim for the purchase-money, or by a transfer of the bonds or notes given as a security for the payment of the purchase-money, would be of the most ruinous consequence to titles to real estate: *Iglehart v. Armiger*, 1 Bland's Ch. 523, 524. The vendor's lien, says the supreme court of Tennessee, "is nothing more than a mere equity, capable of acquiring the force and efficacy of a lien under certain circumstances, in the event of the non-payment of the purchase-money. It is the creature of a court of equity, and rests upon the principle 'that a person, having got the estate of another, shall not, as between them, keep it and not pay the consideration'; *Mackreth v. Symmons*, 15 Ves. 329. But this lien is a mere personal equitable right in the vendor, and is not assignable. It looks only to the security of the vendor, and does not pass to the assignee of the vendee's obligation for the consideration money, and consequently cannot be enforced in his favor": *Green v. Demoss*, 10 Humph. 374; see also *Jackman v. Hallock*, 1 Ohio, 320; *Wellborn v. Williams*, 9 Ga. 86 [52 Am. Dec. 427]; *Briggs v. Hill*, 6 How. 362; *Gilman v. Brown*, 1 Mason, 221; and the note of Hare & Wallace to *Mackreth v. Symmons*, 2 Lead. Cas. Eq. 276, where all the authorities are cited.

There is a marked distinction between the lien of a vendor after absolute conveyance and the lien of a vendor where the contract of sale is unexecuted. In the latter case, the vendor holds the legal estate as security for the purchase-money. He can assign his contract with the conveyance of the title,—and in such case his assignee will acquire the same rights

and be subject to the same liabilities as himself: See *Sparks v. Hess*, 15 Cal. 194, and *Taylor v. McKinney*, 20 Id. 618. In the former case, the vendor retains a mere equity, which, to become of any force or effect, must be established by the decree of the court.

It follows that the district court erred in directing the enforcement of the lien of the vendor in favor of the plaintiff.

The judgment must be reversed, and the court below directed to enter upon its findings a simple money judgment against the defendant for the amount due upon the note, and to deny the prayer for the sale of the premises.

Ordered accordingly.

NORTON, J., concurred.

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**NATURE OF VENDOR'S LIEN, GENERALLY:** *Wellborn v. Williams*, 52 Am. Dec. 427; *Salmon v. Hoffman*, 56 Id. 322; *Manly v. Slason*, 52 Id. 60; *Briscoe v. Bronaugh*, 46 Id. 108; *Lincoln v. Purcell*, 73 Id. 196.

**ASSIGNMENT OR TRANSFER OF VENDOR'S LIEN:** *Conner v. Banks*, 52 Am. Dec. 209; *Moore v. Anders*, 60 Id. 551; *Murray v. Able*, 70 Id. 330; *Kern v. Haslerigg*, 71 Id. 360; *Griffin v. Camack*, 76 Id. 344.

**WAIVER OF VENDOR'S LIEN:** *Conover v. Warren*, 41 Am. Dec. 196. May be waived, either expressly or by implication: *Mims v. Lockett*, 68 Id. 521. Presumption of waiver of: *Marshall v. Christmas*, 39 Id. 199; *Conover v. Warren*, 41 Id. 196; *Dibblee v. Mitchell*, 77 Id. 99.

**WHEN VENDOR'S LIEN IS NOT WAIVED:** *Manly v. Slason*, 52 Am. Dec. 60; *Boos v. Ewing*, 49 Id. 478; *Plowman v. Riddle*, 48 Id. 92; *Aldridge v. Dunn*, 41 Id. 224; *Kniseley v. Williams*, 46 Id. 193; *Mims v. Lockett*, 68 Id. 521.

**THE PRINCIPAL CASE IS CITED** as covering the point that a vendor's lien is not assignable, in *Lewis v. Covillaud*, 21 Cal. 189; *Williams v. Young*, Id. 228; *Porter v. Brooks*, 35 Id. 204, 206; *Ross v. Heintzen*, 36 Id. 321. It is cited to the point that indorsement of a note given for the unpaid purchase-money of land transfers the vendor's lien, in *Stevens v. Chadwick*, 10 Kan. 414; S. C., 15 Am. Rep. 353. It is cited to the point that the vendor's lien will be considered as waived, whenever any security is taken beyond the personal obligation of the vendor, unless there is an express agreement or proviso that the lien shall be retained, in *Robles v. Clarke*, 25 Cal. 328; *Wells v. Harter*, 56 Id. 344; *Perry v. Grant*, 10 R. I. 339; *Pack v. Carder*, 4 Bush, 126. It is cited as to the right of the vendor of land to enforce his equitable lien thereon for the purchase-money, in *Camden v. Vail*, 23 Cal. 637; and is cited to the point that the vendor's lien for the unpaid purchase-money attaches to the land equally whether it has been conveyed to the vendee or is only contracted to be conveyed, in *Hill v. Grigsby*, 32 Id. 59.

## SPEYER v. IHMELS.

[21 CALIFORNIA, 280.]

**SUBSEQUENT ATTACHMENT CREDITOR MAY INTERVENE**, in action for recovery of money in which an attachment has been issued and levied upon property of defendant, at any time before the entry of judgment, for the purpose of contesting the validity of the first attachment.

**WHERE SUBSEQUENT ATTACHING CREDITOR INTERVENES IN ACTION FOR PURPOSE OF SETTING ASIDE PRIOR ATTACHMENT OF PLAINTIFF IN SUCH ACTION**, on the ground that it was fraudulently taken out, the intervenor occupies the position of a defendant, and the burden of proof is upon the plaintiff.

**APPELLANT CANNOT TAKE ADVANTAGE OF ERRONEOUS RULING** which affects the rights of parties who have not appealed, but not his own rights.

**NEW TRIAL WAS GRANTED, WHERE MERITS OF CASE WERE NOT INVESTIGATED IN COURT BELOW**, by reason of uncertainty as to the proper mode of procedure, although the decision below upon the main question involved was approved, and the only error disclosed might have been cured by a modification of the judgment.

**THE** opinion states the case.

*F. Hereford*, for the appellants.

*George R. Moore and E. B. Crocker*, for the respondents.

By Court, NORTON, J. This is a case arising under the provisions of the civil practice act relative to interventions.

On the 10th of January, 1861, the plaintiff commenced his action, and caused an attachment to be levied upon the property of Ihmels & Co. On the same day, Eggers & Co. commenced an action against the same defendants, and caused an attachment to be levied upon the same property, but subsequent to the plaintiff's levy, and in due course, obtained judgment. On the day previous, E. L. Goldstein had commenced an action against the same defendants, and caused an attachment to be levied upon the same property, but also subsequent to the plaintiff's levy. Before a default was entered against the defendants in this action, E. L. Goldstein and Eggers & Co. severally filed interventions, setting forth these facts, and also averring that the property attached was only sufficient to satisfy the plaintiff's claim, and also charging that the plaintiff's demand was not due at the time he commenced his action, and also that he had no valid demand against the defendants, and that his action was prosecuted for the purpose of hindering and defrauding creditors of the defendants. A general demurrer was interposed to these complaints of intervention; that is, that the facts set forth do not constitute a

cause of intervention. The demurrer was overruled, and then the plaintiff answered the interventions, and upon the action coming on for trial, after the intervenors had made proof of their attachment proceedings, and the plaintiff had shown the default of the original defendants, each party moved the court for judgment in his favor, without giving further evidence, and thereupon the court found in favor of the plaintiff against the defendants, and in favor of the intervenors against the plaintiff, and adjudged that the plaintiff recover the amount of his demand against the defendants, and that his attachments be set aside, and that the sheriff pay over the money in his hands to the intervenors *pro rata*. From this judgment the plaintiff appeals. The two main points presented are: 1. Whether the facts show a case for a proceeding by intervention; and 2. Whether the *onus probandi* was on the plaintiff to prove his cause of action as between him and the intervenors, or on the intervenors to prove their cause of action against the plaintiff.

The provisions of the practice act relating to interventions were not a portion of the system of proceedings in civil cases as originally enacted, but were adopted in 1854 from the laws of Louisiana. In a case like the present, before the introduction of these provisions, and as doubtless may still be done, the proceedings would have been by a separate action in the nature of a bill in chancery, as in the case of *Heyneman v. Dennenberg*, 6 Cal. 376 [65 Am. Dec. 519], or by motion to the court, as in the case of *Dixey v. Pollock*, 8 Id. 570. But in the case of *Davis v. Eppinger*, 18 Id. 378 [79 Am. Dec. 184], where the facts were like those in this case, it was decided to be a proper case for intervention. Although the intervenors have not a claim to or lien upon any property which is the direct subject of litigation in this action, they have a lien upon property which is held subject to the results of the litigation, and which would be lost to the intervenors, if the original action should proceed to judgment and execution. If the case does not fall within the precise definition of the cases in which intervention takes place, as given in section 659, and as explained in the case of *Horn v. Volcano Water Works*, 13 Id. 62 [73 Am. Dec. 569], it is substantially within the object provided for by that section, and as that is a law only regulating modes of procedure, and not affecting rights of property, we think the interpretation given to it in the case of *Davis v. Eppinger*, 18 Id. 378 [79 Am. Dec. 184], should not be changed.



The second point, we think, is also controlled by the decision which establishes the right to intervene. The ground upon which the intervenors are allowed to become parties to this action is, that by reason of their lien upon the property attached they are interested in preventing the plaintiff recovering a judgment. They are for this purpose defendants in the action, and as the allegations in their complaint, aside from those made for the purpose of showing their right to intervene, are in effect a denial that at the time the plaintiff brought his action, and attached the property, he had any cause of action, in order to obtain a judgment, so far as they were interested, after they had proved the facts alleged to show their right to intervene, he was required to prove his cause of action. Although in the case of *Davis v. Eppinger*, 18 Cal. 378 [79 Am. Dec. 184], and in the case of *Horn v. Volcano Water Co.*, 13 Cal. 70 [73 Am. Dec. 569], it was decided that judgment might be rendered against the original defendants, it was because under our system the court, by its judgment, can make various dispositions to meet all the exigencies of the case, and thus allow the plaintiff to recover a judgment against those defendants, and at the same time control the judgment, so far as it would affect the intervenor's liens upon the property.

The objection that the judgment should not have directed the money in the sheriff's hands to be paid to the intervenors *pro rata* cannot avail the appellant, because it is a matter in which he is not interested, and those who are interested in it have not appealed.

But a judgment having been rendered for the plaintiff against the original defendants, that portion of the judgment which sets aside the plaintiff's attachment absolutely was erroneous. It should only have been postponed to those of the intervenors. In this respect the judgment must be modified.

The record in this case appears to have been made up amicably between the attorneys, and some of its defects supplied by stipulations, and neither in the grounds of error or in the briefs is any distinction taken between the cases of the intervenors, although there appears to be a difference which might have required a modification of the form of the judgment, but not in a matter affecting the substantial rights of the plaintiff, who alone has appealed.

The cause must be remanded to the court below, with direc-

tions to modify the judgment by striking out that portion which directs the attachment of the plaintiff to be set aside, and by directing the money in the sheriff's hands to be applied, first to the payment of the judgments of the intervenors *pro rata*, and the surplus, if any, to the payment of the plaintiff's judgment. Each party to pay his own costs on appeal.

FIELD, C. J., concurred.

NORTON, J. (on rehearing). We granted a rehearing in this case principally for the purpose of considering whether our decision might not be modified so as to allow the parties a new trial. The merits of the case were not investigated, and as this was occasioned by an uncertainty as to the proper mode of proceeding under the anomalous provisions of the practice act relating to interventions, we think there should be a new trial. In other respects we adhere to our opinion as heretofore expressed.

The judgment is therefore reversed, and the cause remanded for a new trial. The costs of this appeal to abide the event.

FIELD, C. J., concurred.

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ERROR WHICH MANIFESTLY AND NECESSARILY CAUSED NO INJURY TO PARTY affords him no ground for a new trial: *People v. Cunningham*, 53 Am. Dec. 709; and see *Jewett v. Lincoln*, 31 Id. 36; *Googins v. Gilmore*, 74 Id. 472. Nor is it ground for a new trial that the charge of the court was erroneous, if the verdict was not: *Wellborn v. Weaver*, 63 Id. 235.

NEW TRIAL WILL BE GRANTED IF MATERIAL ALLEGATIONS ARE NOT PROVED: *Ryan v. Copes*, 73 Am. Dec. 106; or upon a contradictory verdict, it seems, showing that other counts were considered besides those upon which the verdict purports expressly to be found: *Id.*

THE PRINCIPAL CASE IS CITED IN *McComb v. Reed*, 28 Cal. 287, as authority for the alternative modes which may be pursued by a subsequent attaching creditor for the protection of his rights. And it is cited in *Mining Co. v. Bulion Min. Co.*, 3 Saw. 657, as an example of the reversal of a judgment, technically correct on the record, for the protection of the rights of the parties.

**CASES**  
**IN THE**  
**SUPREME COURT OF ERRORS**  
**OF**  
**CONNECTICUT.**

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**COLT v. IVES.**

[31 CONNECTICUT, 25.]

**SHARES IN STOCK OF CORPORATION** are subjects of sale, mortgage, or pledge, and are liable to attachment and execution, like other personal property.

**WHEN QUESTION CONCERNING SHARES IN STOCK OF CORPORATION** is between a vendee and an attaching creditor of the vendor, as to which has the better title, and it appears that an instrument of transfer or assignment was executed prior to the service of the attachment, then if the vendee's purchase was made in good faith and for a valuable consideration, in equity his title will prevail; provided he has done all the law requires of him, and all that it is possible for him to do in taking possession, such as the nature of the property is susceptible of.

**STOCK SOLD** but not legally transferred is open to attachment by the creditors of the vendor, upon the same ground as that upon which personal chattels sold but retained in the possession of the vendor are liable to attachment by the vendor's creditors; and facts which will excuse the retention of chattels will excuse defects in the transfer of the stock.

**WHERE VENDOR OF STOCK HAS MADE EFFORT** to get the assignment perfected on the transfer books of the corporation, and on failure to accomplish this has made an effort to make the assignment as notorious as possible, using not only due diligence but all possible diligence, his retention of possession is exempted from the condemnation of the law, and a perfect equitable title vests in his vendee which will be protected as against subsequent attaching creditors of the vendor.

**WHEN UTMOST DILIGENCE HAS BEEN USED** by both purchaser and vendor to make the sale and delivery of stock as complete as possible, the rights of an attaching creditor of the vendor will not be placed above those of the *bona fide* purchaser.

**BILL** in equity to enjoin the levy of executions upon certain shares of stock. The facts are as follows: One Jarvis was ap-

pointed the guardian of petitioner, Mrs. Colt, his daughter, a minor and unmarried. There came into his hands at this time five thousand dollars in cash, no part of which she has ever received. At the time of the marriage of his daughter, the sum of money above mentioned had been invested by Jarvis, together with money of his own, in stocks and other securities. It was agreed between them before the daughter's marriage, she being then of full age, that she should select in payment of the money in the hands of her guardian, from any of the securities owned by him, such amount as would be equal to that sum. She chose the stock of the Hartford and New Haven Railroad Company, and Jarvis assented to such selection. The stock was not at this time assigned or transferred to her, but an instrument for that purpose was drawn, which remained unexecuted. Said stock was afterwards attached at the suit of the Middletown Savings Bank, as the property of Jarvis; he, not knowing that the stock was about to be attached, had gone on the same day to have it transferred according to his agreement, but upon hearing of the attachment he did not have it transferred; afterwards, however, he transferred forty-nine shares of said stock to Mrs. Colt, subject to the attachment before mentioned. The instrument of assignment or transfer he left in the hands of one Fitch, the secretary of the company, for record, and whatever else the by-laws of such company might require in relation thereto. At the same time, he surrendered the certificate of stock which he held; but the president of the company then, and thereafter, before the time of bringing the present suit, declined to allow the instrument of assignment to be recorded, or any transfer of the stock to be made on the books of the company, for the reason that the shares had been attached. The instrument of assignment was drawn in accordance to law and the by-laws of the company. Some time afterwards the Middletown Savings Bank recovered judgment, which was satisfied out of other property. The attachment against said stock was then determined, and it was left free from all encumbrance prior in date to the assignment before mentioned. The company still refused, however, to cause the transfer to be recorded on their books, because said stock had, subsequent to said assignment, been attached by one Ives, who recovered judgment, which was satisfied out of other property before the commencement of the present suit. The present suit arises out of attachment levied upon said stock as the property of Jarvis. The attaching creditors being

T. French, E. S. Rowland, and G. K. Whiting, who, together with Ives, are made respondents. The attaching officer was informed at the time of making the levy that the stock stood in the name of Jarvis on the books of the company; but that the secretary thereof had for some time held an assignment of the same to Mrs. Colt, together with a power of attorney from Jarvis, to transfer and record the stock to her on such books. Respondents claim a lien on the stock, also the right to levy execution thereon, and sell the same to satisfy their claims against Jarvis. The case is reserved for the advice of this court.

*Baldwin and McFarland*, for the petitioner.

*Perkins and Perkins*, for the respondents.

By Court, HINMAN, C. J. The attaching creditors, who are the real parties in interest in this cause, assume that by a course of decisions in Connecticut, stock in a corporation is held to be so peculiar in its nature and character that no transfer can be made of it, or even any equitable interest acquired in it, as against attaching creditors, unless by an actual transfer made upon the corporation books, or recorded in them, in the mode prescribed by the charter or by-laws of the institution; and the cases of *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579, *Northrop v. Newtown and Bridgeport Turnpike Co.*, 3 Id. 544, and *Northrop v. Curtis*, 5 Id. 246, subsequently sanctioned by more modern cases in our reports, as is claimed, are relied upon in support of the position. The first two of these cases, and the case of *Oxford Turnpike Co. v. Bunnell*, 6 Id. 552, do undoubtedly decide that, in actions at law, in cases where the legislature in the act of incorporation either prescribe the mode of transferring stock or authorize the company to do it in their by-laws, and the company do in their by-laws prescribe a mode as the only one to be pursued, that mode must be followed, or the legal title will not pass by an assignment which would be good at common law had no particular and exclusive mode of transfer been prescribed. These cases, and others to the same effect, being actions at law, conversant only with what at the time was considered the strict legal title to corporate stock, have necessarily no controlling force in a case depending upon equitable instead of legal principles. And although the case of *Northrop v. Curtis*, 5 Id. 246, was upon a bill in chancery praying that the legal title to certain shares of stock might be transferred to the plaintiff, who

claimed the equitable title thereto, yet the case itself shows that the plaintiff relied, not only upon what he considered an equitable as distinguished from a legal assignment of the stock to himself, but more particularly upon the fact that the party from whom he claimed to have derived his title, such as it was, had only an equitable interest in the stock to assign, and therefore could not create in the plaintiff or his assignee any better title than he himself had in it; and it was upon this last ground that he insisted that the intervening attaching creditors took nothing, because, as he claimed, the debtor's equitable interest was not the subject of an attachment. The court was of opinion that the debtor had a valid legal title at the time his stock was attached and taken in execution, and therefore that the plaintiff's title, derived from him subsequently to the attachment, was of no validity, and on this ground dismissed the bill. It appears to us, therefore, that there is nothing in any of these cases that ought to control our determination of the present case contrary to the strong equitable claim of the plaintiff as shown in the facts found by the court, whatever may be thought of some of the remarks made by the judges in giving reasons for the decisions. On the contrary, the cases themselves, so far as they decide that there can be no legal transfer of stock except upon the books of the company, or by an assignment actually recorded on those books, may be regarded as authorities showing that the plaintiff has no legal title to the stock, and is therefore justified in applying to a court of equity for relief.

Shares in the stock of a corporation are the subjects of sale, mortgage, or pledge, and are liable to attachment and execution like other personal property. And when the question is between a vendee and an attaching creditor of the vendor as to which of them has the better title, and it appears, as it does here, that the instrument of transfer or assignment was executed prior in point of time to the service of the attachment, then, if the vendee's purchase was made in good faith and for a valuable consideration, as to which no question is made in this case, it would seem that in equity his title ought to prevail, provided that he has done all that the law requires of him, and all that it was possible for him to do, in taking such possession as the nature of the property is susceptible of. In regard to chattels, there must be a substantial change of possession accompanying and following the sale, or it will, unexplained, be conclusive evidence of a fraudulent trust, which

will render the sale void as to creditors. Possession being the usual indication of ownership in personal chattels, the law looks upon the purchaser's neglect to take and hold possession of the property purchased as evidence that the sale was fictitious, and therefore as to the vendor's creditors treats the property as still his, notwithstanding the sale. So in respect to the assignment of ordinary choses in action, there must be notice of the assignment to the debtor, — the assignmen<sup>t</sup> conveying but an equitable interest in the thing, and notice to a trustee being in equity the ordinary and only practicable mode in which an assignee can protect his interest. And in the case of the purchase of stock in a corporation, there must be such a transfer of it as the legislature in the charter or by statute prescribes; and notice of the assignment of choses in action, and the transfer required by statute of corporate stock, stand in lieu of the taking and retaining of the possession of personal chattels sold, being the only possession the nature of the property admits of. These elementary principles, for which surely no authority need be cited, it is necessary to bear in mind in considering a case of this sort; since, if a good reason is shown for not giving notice of the assignment of a chose in action, as was the case in *Bishop v. Holcomb*, 10 Conn. 444, or for the failure to procure a transfer of stock on the books of a corporation, as in this case, which would have been sufficient to excuse the taking possession of personal chattels sold, then upon the same principles upon which the taking possession in the latter case would be excused, it would seem that the act which is ordinarily required in order to perfect an assignment of a chose in action or of stock in a corporation ought in equity certainly to be also excused.

The application of these suggestions to the case in hand seems quite obvious. We need not determine whether the written assignment of the stock by Mr. Jarvis passed the legal title, or only an equitable title, since it is very clear that in either case it passed all the substantial interest, and left in him, if anything, only the technical legal title.

But the respondents claim that, so long as this bare legal title remained, with no knowledge on the part of his creditors that he had made the assignment, it was open to their attachments as his to the same extent as before the assignment. We think this too broad a claim. The ground on which stock sold, but not legally transferred, is open to attachment by the creditors of the vendor, is, as has been suggested, the same



upon which personal chattels sold but retained in the possession of the vendor are liable to attachment by the vendor's creditors. The principle in each case is, that the retention of possession is a badge of fraud,—that is, is evidence of a fraudulent secret trust. This is the reason given in the recent case of *Shipman v. Aetna Ins. Co.*, 29 Conn. 245, why certain stock sold by a written bill of sale, but not transferred, was held to pass to the trustee in insolvency of the vendor; the trustee being held to have taken precisely as an attaching creditor would have done.

But it is well settled that this retention of possession in every case is only a badge,—that is, is evidence of fraud, to be regarded as conclusive where the retention of possession is voluntary and unnecessary.

And it is to be observed that it is the policy of the law which forbids this retention of possession, and the liability of the property to attachment is, in a measure, a punishment, either for the actual fraud or the negligence of the vendor. Hence it is said in the cases on this subject that “proof of the payment of a full consideration, or of the justice of the debt for which the property is taken on legal process, accompanied with the highest evidence of the honesty of the transaction, will not, in general, be sufficient to repel the legal effect of neglecting an actual removal of the property”: *Mills v. Camp*, 14 Conn. 219 [36 Am. Dec. 488]; *Kirtland v. Snow*, 20 Id. 23. The rule therefore is, to a certain extent, punitive in its character, creating something in the nature of a forfeiture for the violation of the policy of the law. It is on this ground that the rule is relaxed where there has been no voluntary violation of this policy. If the manual delivery of the article sold, in consequence of its bulk or situation, is impossible, the delivery and taking possession are excused. So where the vendor has used due diligence to make delivery, and the vendee to take possession, the property is not open to attachment; as in the case of *Meade v. Smith*, 16 Id. 346, where it was held that a purchaser in New York was to be allowed a reasonable time to come into Connecticut to take possession of the property purchased; and it is always held that a grantee is to be allowed a reasonable time to get his deed to the recording office. Now, whether this principle ought to be applied in actions at law, depending upon rigid legal principles, to the case of the transfer of stock in a corporation, perhaps depends upon whether we regard the *dictum* in the case of *Newtown and*

*Bridgeport Turnpike Co. v. Northrop*, 3 Id. 544, as correct, "that the transfer on the books of a company does not operate by giving notice of an antecedent conveyance, but is a fact essentially necessary to originate a title."

But we are not called on to discuss this question at this time. It is only necessary to say, therefore, that the respondents admit that such is not the law generally; and it is claimed merely to be the law of Connecticut, founded upon peculiar views which have obtained here. But whether it is law or not, so far as regards the bare technical legal title, and to be adhered to in trials at law, we are satisfied that it ought not to be regarded as having the controlling force and efficacy claimed for it in equity. No such ground was taken or suggested in the case of *Shipman v. Aetna Ins. Co.*, 29 Conn. 245, before referred to; and the late case of *Bridgeport Bank v. New York and N. H. R. R. Co.*, 30 Id. 231, proceeded throughout upon the idea that the plaintiffs had a good equitable title to the stock claimed in that case. In analogy, then, to the principles which have been suggested, we think the effort of the vendor to get the assignment perfected on the transfer books of the company, and on failure to accomplish this his effort to make the assignment as notorious as possible constituting not only due diligence but all the diligence on his part that it was possible to exercise, ought to exempt this retention of possession from the condemnation of the law, if a retention of possession ever can be. Indeed, the retention of possession was as nearly nominal as possible. Assuming, then, that the respondents are correct in the claim that this retention of possession involves the retention of the naked legal title also, is this circumstance sufficient to distinguish the case from those cases where the retention of possession by the vendor may be excused or justified? In the case of the sale of personal property, the mere sale is ordinarily sufficient to pass the legal title between the parties before delivery; while here it is claimed that the formal transfer on the books of the company was necessary for that purpose. But ought this distinction to be allowed to deprive the petitioner of her property, when if it was of any other description she would confessedly hold it? Is the distinction so material that the case must rest upon the mere fact that a bare legal title was retained against the desire of the vendor and his utmost effort to convey it? This certainly is to place the case upon the most technical ground possible, and it would vest in corporations and their

officers the power to prevent the transfers of their stock by the holders of it, — a power which, it is too much to be feared, would not always be exercised with the most disinterested motives. It is true, there will sometimes be cases where a mere technical title will prevail; but it is desirable, so far as practicable, that the substantial and equitable ownership should be sustained rather than a technical title; and so far as the rule was intended to be punitive in its application, in order to compel a conformity to the policy of the law, there is no reason why a party who has done all that he possibly could should be made to suffer any penalty. The plaintiff, then, having done, or having had done for her, all that could be done, is wholly without fault. Her debt was of as high a nature as the respondents'. She had acquired a perfect equitable title to the stock, and she had taken every possible means to obtain the legal title also. An attaching creditor, while he has rights which have been too long and too definitely settled to be disturbed or essentially modified by judicial decision, is yet by the modern policy of our law regarded with less favor than formerly, when attachments and sales on execution were the only compulsory mode of securing an appropriation of a debtor's property to the payment of his debts. It is a proceeding, moreover, by which one creditor may gain a preference over others equally deserving, and thus contravene the present policy of our insolvent laws, based upon the more equitable principle of an equal distribution. And it is at best a mode of seizing property without previous notice, which is always injurious and often ruinous to the debtor.

We do not feel, therefore, that we are under any obligation, without any substantial reason being given for it, to place the rights of an attaching creditor above those of a *bona fide* purchaser, where the utmost diligence has been used, as in this case, by both purchaser and vendor to make the sale and delivery complete as possible. If the retention of the bare legal title to the stock, so merely formal as it was here, does not furnish a reason for holding the purchase to have been colorable and conclusively fraudulent against creditors, as we think it does not, then it seems quite clear that there can be no other which would subject this property to attachment that would not apply in all its force to any property in the hands of a trustee, and subject that also to liability for the trustee's debts. For these reasons, we are satisfied that Mrs. Colt is equitably entitled to the stock; and that the attaching cred-

itors should be enjoined against proceeding to levy their executions upon it. And so we advise the superior court.

In this opinion the other judges concurred, except SANFORD, J., who did not sit.

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SHARES OF STOCK WHETHER SUBJECT TO EXECUTION: *Coombs v. Jordan*, 22 Am. Dec. 236.

STOCK NOT LIABLE TO ATTACHMENT AGAINST VENDOR, WHEN: See *United States v. Vaughan*, 5 Am. Dec. 375, and note 380.

STOCK, ASSIGNABILITY OF, AND MODE OF: See *Commercial Bank etc. v. Kortright*, 34 Am. Dec. 317, and note 329; *Duke v. Cayuga Navigation Co.*, 44 Id. 472.

THE PRINCIPAL CASE IS CITED IN *Reed v. Copeland*, 50 Conn. 488, as limiting and explaining the earlier state decisions on the questions involved. In the latter case, the court say that if the equitable title to stock should prevail in the case here reported, with much stronger reason it should prevail against attaching creditors in the case here cited, as between the original parties to the transaction and their representatives. In the latter case, a testator had assigned stock to a legatee, and had recognized the title as being in her, but no legal assignment had been made on books of the corporation.

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## BOSWELL v. GOODWIN.

[31 CONNECTICUT, 74.]

EVIDENCE IS INADMISSIBLE TO PROVE fact not alleged in the bill.

MORTGAGE GIVEN AND RECORDED WHEN EXECUTED to secure advancements, to be made to the mortgagor, or liabilities to be assumed for him by the mortgagee in future, will be upheld and enforced as against subsequent mortgages, as to all advancements made or liabilities assumed prior to the execution of such subsequent mortgages.

MORTGAGE GIVEN AND RECORDED TO SECURE ADVANCEMENTS to be made to the mortgagor or liabilities to be assumed for him by the mortgagee in future, will not take precedence of a subsequent mortgage, also recorded, and upon which advancements have been made, when the prior mortgagee with notice in fact assumes an original liability, which he is not compelled to do, after the subsequent mortgage is executed and advancements made thereon.

WHEN ONE HAS ACTUALLY MADE OR UNDERTAKEN TO MAKE ADVANCEMENTS, or assumed or undertaken to assume liabilities for another, and has taken a mortgage for indemnity, which he has recorded, his encumbrance is consummated and cannot be defeated by a subsequent mortgage. But when, without some further act to be done by him, the mortgage has, and can have, no effect, and where it is optional with him to do such act or not, whether he should not be required, until he does such act, to recognize the intervening rights acquired by others, and be held chargeable with notice of the state of the mortgagor's title, disclosed by the public records when the act is done, *quære*.

**BILL** for foreclosure. The opinion states the facts.

*McFarland*, for the petitioner.

*Fellowes and Fellowes*, for the respondents.

By Court, SANFORD, J. The evidence objected to on the hearing before the committee was inadmissible. The bill contained no allegation of the fact which that evidence was introduced to prove; and the respondents, having no notice of the claim, cannot be supposed to have come to the trial prepared to meet it. For this error of the committee in receiving improper evidence, therefore, as the bill now stands, the respondents, Seymour & Co., are entitled, upon their remonstrance, to have the report of the committee set aside.

But as the petitioner's bill may be amended, so as to render the evidence objected to admissible, we deem it proper for us to express our opinion upon the merits of the case as presented by the report now before us.

It seems to be settled by a series of adjudications that mortgages given to secure advancements to be made to the mortgagor, or liabilities to be assumed for him by the mortgagee in future, are to be upheld and enforced against subsequent purchasers, mortgagees, and attaching creditors, even where the registration of deeds and mortgages is required by law: *Crane v. Deming*, 7 Conn. 387; and although it is optional with the mortgagee whether he will make such advancements or assume such liabilities or not, provided they are made or assumed in good faith, and without notice of the subsequent intervening encumbrance: *McDaniels v. Colvin*, 16 Vt. 300 [42 Am. Dec. 512]; *Shirras v. Caig*, 7 Cranch, 34; Story, J., in *Conard v. Atlantic Ins. Co.*, 1 Pet. 386; *Truscott v. King*, 6 Barb. 346.

The petitioner's mortgage was given on the 24th of August, 1855, and was recorded the same day. The condition was of the tenor following: "Whereas the said Boswell has agreed, from time to time, during his pleasure only, to indorse notes for Goodwin & Co. as they may desire, but so that there shall not be outstanding indorsements at one time exceeding six thousand dollars, and whereas we have given him our joint bond of even date to indemnify and save him harmless from all such indorsements, now if we keep and fulfill the condition of said bond, and save him harmless as aforesaid, then this deed shall be void, otherwise not."

On the 23d of January, 1858, Goodwin & Co. mortgaged the same property to the respondents, Seymour and Sage, consti-

tuting the firm of Seymour & Co. The condition of the mortgage recited that the mortgagors had given their penal bond to the mortgagees "in the sum of twelve thousand dollars, provided that if the grantors shall pay all sums that may be advanced to them under the firm of Goodwin & Co., by the grantees composing the firm of Seymour & Co., by note or otherwise, which they are to do for the accommodation of said Goodwin & Co., and save them harmless therefrom, then said bond to be void. And said advances are at no time to exceed ten thousand dollars, nor to be made but within five years. Now, if we keep and fulfill the condition of said bond, then this deed to be void, otherwise to remain in force." And on the 11th of February, 1859, Goodwin & Co. gave to Seymour & Co. another mortgage of the same, together with other property, the condition of which mortgage recited that the said Seymour & Co. had loaned and advanced to them, for their accommodation, their promissory notes to the amount of five thousand dollars (specifying the date and amount of each note, and when, where, and to whom payable), and providing that if Goodwin & Co. should well and truly indemnify and save harmless Seymour & Co. from all loss, costs, damage, and harm, by reason of said notes, then the deed should be void, otherwise it should remain in force.

Both of these mortgages to Seymour & Co. were recorded, the first on the 27th of May, 1858, and the last on the 15th of February, 1859, and in both of them the petitioner's mortgage was expressly mentioned.

In pursuance of the agreement between the petitioner and Goodwin & Co., the petitioner from time to time indorsed the notes of Goodwin & Co. for their accommodation, down to the sixth day of March, 1861, and on that day indorsed the note for two thousand seven hundred dollars described in the bill, and on the 20th of March, 1861, the note for three thousand dollars described in the bill. Both of these notes the petitioner has been obliged to pay. The note for two thousand seven hundred dollars was the last of a series of renewals of a note indorsed by him on the 8th of January, 1858.

Upon this state of the facts, the note for two thousand seven hundred dollars is entitled to precedence before any of the claims of Seymour & Co., under either of their mortgages. The original note was made and indorsed by the petitioner on the 8th of January, 1858, fifteen days before the earliest of the mortgages of Seymour & Co. was made, and several months

before it was recorded, and for that indorsement the petitioner has never yet been "indemnified." And as his original liability has thus been continued through all the successive renewals of the paper, his original security also has continued, and he has now a right to resort to it for indemnity, as he might have done if, instead of renewing, he had been compelled to pay the original note at its maturity: *Bolles v. Chauncey*, 8 Conn. 389; *Pond v. Clarke*, 14 Id. 334; *Smith v. Prince*, Id. 472; *Dunham v. Dey*, 15 Johns. 555 [8 Am. Dec. 282].

Of the existence and terms of the petitioner's mortgage, Seymour & Co. were in legal presumption apprised by the record. And by the law they were apprised of the protection which that mortgage afforded the petitioner for all indorsements made before the mortgage to them was given, and the extent of that protection. They knew, or at any rate they are chargeable with the knowledge, that the original note was outstanding, and that the petitioner was liable thereon as indorser, when they took their mortgages. Or if they did not know these facts, it was because they had omitted to make such inquiries as men of ordinary prudence and sagacity usually make under such circumstances, and intended to assume the risk; and in either event they ought to abide the consequences of their presumption or neglect.

The three-thousand-dollar note stands upon different ground. That was an original note, made and indorsed long after both of the mortgages to Seymour & Co. were executed, and after advancements had been made under the first of them, amounting to more than twenty-five thousand dollars, and under the second to more than five thousand dollars, both of which sums still remain unpaid. And it is found that the petitioner had notice in fact that some intervening mortgages upon the property mortgaged to him had been given by Goodwin & Co. to Seymour & Co. when this indorsement was made.

The peculiar language of the report on this point has not escaped our notice, but we think the fair import of it is as above expressed, that the petitioner had notice in fact of these intervening mortgages,—ample notice of the existence of rights of some kind residing in Seymour & Co., which it was his duty to respect, and which he had no right to disregard. We deem it of no essential importance, as affecting the rights of these parties, that the petitioner did not know for what "precise purpose" these mortgages had been made, and did not know that Seymour & Co. had made any advancements to Goodwin &



Co. under the first, or paid any of the notes loaned upon the security of the last. He did know that certain mortgages had been made to Seymour & Co., and consequently, that Seymour & Co. had acquired some rights in the property mortgaged to him, which rights further advancements or indorsements by him, if allowed to take precedence of their claims, would necessarily affect and might seriously impair. He was informed to whom these mortgages had been given, and he knew that the town records would disclose the true character and extent of the encumbrance created by them, and clearly indicate the source from which exact and certain information could be obtained.

“Whatever,” says Mr. Justice Story, “is sufficient to put a party on inquiry (that is, whatever has reasonable certainty as to time, place, circumstances, and persons), is, in equity, held to be good notice to bind him”: 2 Story’s Eq. Jur., sec. 400. Or, in the language of Mr. Sugden: “When a man has sufficient information to lead him to a fact, he shall be deemed connusant of it”: 2 Sugden on Vendors, c. 23, sec. 1, p. 552.

The petitioner was under no obligation to indorse this note, and in doing it with the knowledge which he had, and without inquiry, he disregarded the rights of Seymour & Co., as well as the obvious dictates of ordinary prudence and discretion. His mortgage was indeed on record, but that record, though conclusive evidence of notice to subsequent encumbrancers, was notice only that the petitioner had an inchoate mortgage, of no binding force upon either of the parties to it, until some indorsements by the petitioner should be made, and the only utility of which notice was to indicate the source of information, and put subsequent encumbrancers on inquiry.

When one having actually made, or undertaken to make, advancements, or assumed, or undertaken to assume, liabilities for another, has taken a mortgage in proper form for his indemnity, and placed that mortgage upon record, his encumbrance is consummated, and he may safely leave it to its fate. But when, without some further act to be done by him, the instrument has and can have no effect, and where it is optional with him to do such act or abstain from doing it, why should he not be required, until he does that act, to recognize and regard the intervening rights acquired by others, and be held chargeable with whatever notice of the state of the mortgagor’s title the public records may disclose when the act is done? Why should not a mortgage to secure future advancements,

to be made or not, at the option of the mortgagee, be treated in all respects as if it was executed when the contemplated advancements are made in fact?

But as upon this point there is understood to be some diversity of opinion among the members of the court, we prefer to place our decision upon the ground already indicated, that the petitioner had notice in fact of Seymour & Co.'s encumbrance upon the property mortgaged to him, when he indorsed the three-thousand-dollar note; and therefore, that his claim for that indorsement ought to be postponed to the claims of Seymour & Co. to the amount of ten thousand dollars, and interest thereon, under their first mortgage, and to the full amount of the notes loaned by them upon the security of their second mortgage.

We have expressed these opinions in view of the probable amendment of the plaintiff's bill, but our advice to the superior court must of course be predicated upon the record as it stands, and therefore must be that the report be set aside.

In this opinion HINMAN, C. J., and DUTTON, J., concurred. BUTLER, J., delivered a dissenting opinion.

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MORTGAGE TO SECURE FUTURE ADVANCES expected to be contracted is valid as against subsequent purchasers: *Commercial Bank v. Cunningham*, 35 Am. Dec. 322, and note.

MORTGAGE GIVEN TO SECURE FUTURE ADVANCES will be postponed, as to such advances, to a second mortgage recorded before such advances were made: *Spader v. Lawder*, 49 Am. Dec. 461, and note 463.

RECORDING OF SUBSEQUENT MORTGAGE is not notice to prior mortgagee so as to limit his right to make advances on a mortgage to secure future indebtedness; nor is actual knowledge of the subsequent mortgage sufficient: *Manufacturers' etc. Bank v. Bank of Pennsylvania*, 42 Am. Dec. 240.

THE PRINCIPAL CASE IS CITED in *Ladue v. Detroit etc. R. R. Co.*, 13 Mich. 407, where the court adopts the reasoning of Sanford, J., in the principal case, that a mortgage to secure future advances should be treated as executed at the time when the advances are made.

THE PRINCIPAL CASE IS REPORTED in 3 Am. Law Reg., N. S., 79, and a valuable note appended by Judge Redfield.

EVIDENCE OF DEFENSE NOT PLEADED cannot be given at the trial: *Winton v. Taylor*, 75 Am. Dec. 112, and note 114.

## WOOLF v. CHALKER.

[81 CONNECTICUT, 121.]

**PROPERTY IN DOG RECOGNIZED BY COMMON LAW** has always been held to be "base" or inferior, and entitled to less regard and protection than property in other domestic animals.

**ANY PERSON MAY KILL MAD DOG**, or one that is justly suspected of being mad, or known to have been bitten by a mad dog, without any regard to the right of property in the owner.

**IF DOG BECOMES MISCHIEVOUS**, and inclined to injure the property of others, his owner is bound to restrain him on the first notice, and liable for any mischief he may thereafter do to property of any kind.

**DOG CANNOT, BY ENTERING ALONE** on the land of another and doing mischief, subject his owner to the action of trespass *quare clausum fregit*, as cattle and other animals may; yet if the owner trespass, and while on the land, his dog, unbidden and against his will, does mischief, such action of trespass will lie for the injury.

**DOG, WHETHER BEFORE MISCHIEVOUS OR NOT**, or if so, his owner has knowledge of his disposition or not, if actually found doing mischief or attempting to do it alone, out of the possession of his owner or the charge of a keeper, may be killed, and the act justified, and so he may be destroyed under any circumstances where it is absolutely necessary for the preservation of property.

**NO ACTION WILL LIE AT COMMON LAW** for the first mischief committed by a dog without proving a *scienter*.

**WHETHER DOGS KEPT ON PREMISES OF THEIR OWNER** may, by their noise, become nuisances to adjoining proprietors, and subject their owner to action for a nuisance, *quare*.

**DOG WHICH IS IN HABIT OF HAUNTING** the dwelling-house of another by day and night, and which, by barking and howling, disturbs the peace and quiet, becomes a nuisance, and if necessary may be killed.

**FEROCIOUS DOG ACCUSTOMED TO BITE MANKIND** is a common nuisance, and may be destroyed by any one, and the destroyer, if sued for the killing of such dog, need not allege or prove a *scienter*.

**KEEPING FEROCIOUS DOG IS WRONGFUL** and at the peril of the owner, and therefore *prima facie* the owner is liable to any person injured by such dog, without averment or proof of negligence in securing or taking care of him, and irrespective of any question of negligence of the plaintiff.

**WHETHER OWNER OF FEROCIOUS DOG** can plead the willful misconduct of plaintiff, after warning, as contributing to an injury received from such dog, even if such conduct was the sole cause of it, *quare*.

**OWNER OF FEROCIOUS DOG IS LIABLE** if he bite a person who accidentally treads upon him while he is lying at his owner's door, and so the owner is liable if such dog is irritated by a child, and he bite it.

**OWNER OF FEROCIOUS DOG IS LIABLE** if the dog is permitted to run at large on his owner's premises, and a trespasser is thereby bitten.

**FEROCIOUS DOG IS DANGEROUS INSTRUMENT FOR PROTECTION**, and the owner's keeping him on the premises to protect them against trespassers is unlawful. The owner has no right to keep such dog for any purpose, unless he is kept in an inclosure or building, in the night-time, with caution, and as a protection against criminal wrong-doers, and if his size and ferocity is such as to endanger life, then only as a protection against a felony by "accident or surprise."

**CONNECTICUT STATUTE MAKES OWNER OF MISCHIEVOUS DOG** liable for his first injury to property, without regard to the owner's knowledge of a mischievous propensity, and in respect to a ferocious one it extends the liability of the owner to every injury to the person, whether such owner knew of his ferocity or not, unless committed in protection of his master's premises against a felony.

**TRESPASS** for personal injury done by a dog. The plaintiff, a traveling peddler, was well acquainted in the neighborhood, and on previous occasions had called at defendant's house, and had traded with him and family. On the occasion of this his last visit, he knocked at an outer door for admission, and supposing that he had permission, he passed through an entry into the sitting-room of the house, there meeting defendant and his family. Upon entering, he was attacked by the large and ferocious dog belonging to defendant, who knew of the bad disposition of the dog, and of his having attacked several other parties. The only fault of which plaintiff was guilty was in entering the house without permission, and this, as before stated, he supposed he had obtained. The court found that the disposition of the dog was such as to render him improper to be used for protecting defendant's house during the day, when his family or himself was present, from any one who might be a technical trespasser in entering the house unbidden. Upon these facts, the court rendered judgment for plaintiff. Defendant brought the record into this court for revision, assigning as error that upon the facts found judgment should have been rendered for defendant. When the record was read in this court, it appeared there was no question therein which the court could consider on account of the irregularity with which it was made up. Whereupon a postponement was granted that a new finding might be granted by the trial judge on motion for a new trial. Counsel afterwards agreed upon a substitution of a motion for a new trial in place of the assignment of error. This was allowed by the trial judge. Other facts are stated in the opinion.

*C. Ives*, for the motion.

*C. R. Ingersoll and Clark*, contra.

By Court, BUTLER, J. The rule applicable to actions founded upon the negligence of the defendant, "that if the negligence of the plaintiff essentially contributed to the injury, he cannot recover," is too well settled to be questioned; but it is not applicable to this case. There is but one count

in this declaration, and that is framed upon a statute, which enacts that "whenever any dog shall do any damage, either to the body or property of any person, the owner, etc., shall pay such damage, to be recovered in an action of trespass." This statute is clear and comprehensive in its terms; and if it is literally construed, it imposes an obligation on the owner, etc., of every dog, to pay for any and all damage it may do of its own volition, and when the owner does not set him on and become thereby liable to be sued as for a personal trespass; and the questions made in the court below in bar of the action, relative to the character of the dog, the supposed trespass of the plaintiff, and the negligence of either party, were immaterial. The act extends the liability of the owner of a dog beyond that existing at common law, but no good reason has been urged, and we know of none, why the intention of the legislature should not be holden to have been what the language imports; and there is very clear evidence derived from the state of the common law as it then stood, the mischief which occasioned the passage of the act, and the general policy of the state indicated by its legislation relative to dogs, that such was their intention. As the law in relation to this animal is peculiar, and there was evidently a misapprehension on the trial in respect to the effect of the statute and the applicability of the common-law doctrines of negligence and *scienter*, and such misapprehension has been before observed, we think it well to give the subject a somewhat extended consideration.

At common law, property in a dog, though recognized, has always been held to be "base," inferior, and entitled to less regard and protection than property in other domestic animals. Three reasons may be assigned for this: 1. "Dogs do not serve for food," and for that reason "the law held that they had no intrinsic value"; and "therefore," says Blackstone (vol. 4, p. 236), "though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny." Although since protected by express statutes from theft, the common-law estimate of property in them has never been changed. 2. Because the dog, in common with the class of wild animals to which he originally belonged, is subject to the most distressing and incurable disease known, which he is inclined to communicate, and frequently if not destroyed does communicate, by his bite, to

animals and mankind. For that reason, any person, without regard to any right of property in the owner, may kill a mad dog, or one that is justly suspected of being mad, and stand justified at common law and by our statute: R. S., tit. 3, sec. 73. So, according to modern decisions, he may be killed by any person, if known to have been bitten by a mad dog, although the same rule would not be applied to other more useful and less dangerous animals: *Putnam v. Payne*, 13 Johns. 312. And the third reason is, that the dog is chiefly propagated, kept, and used for purposes (viz., hunting and the protection of the family, person, and property of his owner) which require that he should retain in some degree the natural ferocity and inclination to mischief which characterize him. Thus kept, trained, and used, he is liable to become mischievous, and injure the property of others, noisy, and a private nuisance, ferocious, and accustomed to bite persons, and therefore dangerous to the community and a common nuisance; and these three characteristics impose corresponding obligations upon his owner, and give corresponding methods of redress for an injury committed by an action, or by the destruction of the animal, or both.

1. As to injury to property. If a dog becomes mischievous and inclined to injure the property of others, "his owner is bound to restrain him on the first notice"; and liable for any mischief he may thereafter do to property of any kind. This is elementary law. So, although a dog cannot, by entering alone on the land of another and doing mischief, subject his owner to the action of trespass *quare clausum*, as cattle and other animals which are naturally inclined to rove, and winged animals that prey upon the crops, may do, yet if the owner trespass, and while on the land, his dog, unbidden and against his will, does mischief, that action will lie for the injury: 1 Ch. Pl. 71; *Beckwith v. Shordike*, 4 Burr. 2092; *Van Leuven v. Lyke*, 1 N. Y. 515. And so, whether before mischievous or not, or whether, if so, his owner has knowledge of his disposition or not, if actually found doing mischief, or attempting to do it alone, out of the possession of his owner or the charge of a keeper, he may be killed, and the act justified at common law: *Barrington v. Turner*, 3 Lev. 28; *Protheroe v. Mathews*, 5 Car. & P. 581. And this also by statute in this state: R. S., tit. 3, sec. 73. And so he may be destroyed under any circumstances, where it is absolutely necessary for the preservation of property: *Janson v. Brown*, 1 Camp. 41;

*Wells v. Head*, 4 Car. & P. 568. Other animals may become vicious and injure persons or property, and the injured person may have his action, but may not kill them; and the discrimination against dogs results legitimately from their proneness to mischief, their uselessness, and liability to hydrophobia, and the consequent base character of property in them, and the necessity for that protection, inasmuch as the right to an action *quare clausum* is limited to one or two cases only, and no action at all can be had at common law for the first mischief, or without proving a *scienter*.

2. The dog is a noisy animal, and may in that way become a nuisance and be destroyed. Thus it has been holden that a dog which is in the habit of haunting the dwelling-house of another by day and night, and by barking and howling disturb the peace and quiet of its inmates, and cannot be otherwise prevented, may be killed; although a wanton destruction of a dog may not be justified: *Brill v. Flagler*, 23 Wend. 354. Whether dogs kept on the premises of their owner may, by their noise, become nuisances to adjoining proprietors, and subject their owner to action for a nuisance, seems to be an open question. An elementary writer says they cannot (1 Hilliard on Torts, 2d ed., 644), on the authority of *Street v. Tugwell*, 2 Selw. N. P. 1047, where an action was brought for keeping a kennel of pointers so near the plaintiff's dwelling-house as to disturb his family during the daytime, and prevent them from sleeping in the night, and there was a verdict for the defendant. But that case has been doubted. It has been remarked that Lord Kenyon, in refusing a new trial, intimated that if the nuisance was continued, a new action could be brought, which was an intimation that an action could be maintained; and Judge Nelson, in *Brill v. Flagler*, 23 Wend. 354, plainly intimates that the decision is not a correct exposition of the law. And if the noise of a boiler manufactory, *Fish v. Dodge*, 4 Denio, 311 [47 Am. Dec. 254], or a steam-engine, *Davidson v. Isham*, 9 N. J. Eq. 186, may be a nuisance, *a fortiori* should a kennel of pointers who disturb the sleep of a family be, for undisturbed sleep is not merely a comfort: it is absolutely necessary to health.

3. If the dog be ferocious and accustomed to bite mankind, the law is still more stringent in respect to the duty and liability of the owner, and the right of others to destroy it. Thus a ferocious dog accustomed to bite mankind is a common nuisance, and may be destroyed by any one: *Barrington v. Tur-*



*ner*, 3 Lev. 28; *Brown v. Carpenter*, 26 Vt. 638 [62 Am. Dec. 603]; *Dunlap v. Snyder*, 17 Barb. 561; 1 Hilliard on Torts, 2d ed., 645. In England, if the owner permit him to run at large upon the highway, he is indictable for a misdemeanor: Burn's Justice, 578. And if sued for the killing of such a dog, the defendant need not allege or prove a *scienter*: *Maxwell v. Palmerton*, 21 Wend. 407. The keeping of such a dog is wrongful and at the peril of the owner, and therefore *prima facie* the owner is liable to any person injured by such a dog, without any averment or proof of negligence in securing or taking care of it, and irrespective of any question of negligence of the plaintiff: *May v. Burdett*, 9 Q. B. 101; *Card v. Case*, 5 Com. B. 622. It has been doubted whether, in respect to such a dog, the owner could plead the willful misconduct of the plaintiff, after warning, as contributing to the injury, even if it was the sole cause of it: *May v. Burdett*, 9 Q. B. 101. "It may be," says Lord Camden in that case, "if the injury was solely occasioned by the willfulness of the plaintiff after warning, that may be a ground of defense by plea in confession and avoidance," and it would seem that if the plaintiff have knowledge of the ferocity of the animal, and provoke him willfully, he should be considered to have purposely brought the injury on himself, and be left to bear it, although the owner of the dog be in the wrong in keeping him: 1 Hilliard on Torts, 2d ed., 652. It was holden expressly by Chief Justice Lee, in *Smith v. Pelah*, 2 Stra. 1264, that the owner of such a dog was liable when he was accidentally trodden upon as he was lying at the owner's door and bit the person; "for," said the chief justice, "it [the injury] was owing to his [the owner] not hanging the dog on the first notice. And the safety of the king's subjects ought not to be afterwards endangered." A like verdict was had where such a dog was irritated by a child and bit it. And when the owner of such a dog has permitted him to run at large on his own premises, and a trespasser has been bitten by him, the owner has been holden liable: *Loomis v. Terry*, 17 Wend. 496 [31 Am. Dec. 306]; *Sherfey v. Bartley*, 4 Sneed, 58 [67 Am. Dec. 597].

The principles which underlie these decisions relative to a ferocious dog were fully discussed by the late Judge Sherman, and adopted by this court in *Johnson v. Patterson*, 14 Conn. 1 [35 Am. Dec. 96], which was an action brought against a defendant for placing poison upon his own land so that it could be and was taken by the plaintiff's fowls which were trespassing.

A man may not, in this country, use dangerous or unnecessary instruments for the protection of his property against trespassers. Such instruments may be used in England, but the principles on which their decisions purport to rest are not sustainable or applicable here. The true principles of the common law are recognized here, and a man may use that force which is necessary to protect his property, and no more. And he may keep and use such instruments, and no other, as the same necessary degree of force will justify. A dog is an instrument for protection. A ferocious one is a dangerous instrument, and the keeping him on the premises to protect them against trespassers is unlawful, upon the same principle that setting spring-guns or concealed spears, or placing poisonous food, is unlawful.

This review shows that the defendant in this case would have been liable at common law, if the action had been brought in that form. The court found that the dog was ferocious, accustomed to bite, dangerous, and an improper animal to be kept for protection in the daytime, and that the defendant knew it. The defendant had no right to keep such a dog for any purpose, unless in an inclosure or building, in the night season, and cautiously as a protection against criminal wrong-doers, nor then, perhaps, if his size and ferocity were such as to endanger life, as a protection against anything but a felony "by violence or surprise." Certainly he could not keep him on his premises in the daytime in such manner that a person, by accident, mistake, or a voluntary or involuntary trespass, might be exposed to his fury and be injured. In this case, if the plaintiff was a trespasser at all, he was so unintentionally, involuntarily, and by mistake. In *Beckwith v. Shordike*, 4 Burr. 2092, it was holden that such a trespass might be justified. However that may be, the common law clearly protects a trespasser against a ferocious dog.

And this review of the common law will serve to show that the statute, literally construed, does not go a great way beyond it. In respect to a mischievous dog, it makes the owner liable for the first injury to property, and without regard to his knowledge of a mischievous propensity. And in respect to a ferocious one, it extends the liability of the owner to every injury to the person, whether the owner knew of his ferocity or not, unless committed in protection of his master's premises against a felony.

That it was the purpose of the law thus to extend protection to persons and property, further and conclusively appears from an examination of our legislation respecting the animal. The owners of dogs have often been heavily taxed for them, and authority given to kill them if the taxes were not paid; and if running at large without a collar, they may be killed by any one. We have seen that, by statute, any person may kill them, if found at large doing mischief. In 1732, an act was passed providing that when any contagious disease broke out in any town, in order to prevent the spreading of it by dogs, they should all be killed by their owners; and if they did not kill them, any person might do it. In 1736, it was enacted that if any sheep were killed, and it was not known by what dogs, and complaint should be made on suspicion to the selectmen or sheep-master, and there was great reason for suspicion, they might order the dogs to be killed; and that the owners of such suspected dogs should be liable to pay for the injury, unless they could prove that their dogs did not do the mischief; thus not only depriving the owners of their property in the suspected dogs, but making such suspicion a *prima facie* ground of liability for the value of the sheep. That law was in force when the statute in question was passed, and until the revision of 1821. In 1765, an act was passed reciting in the preamble that much mischief had been done by dogs, and that the hydrophobia was prevalent, and authorizing the selectmen of towns to make rules, orders, and regulations for confining, restraining, killing, and destroying them, and providing penalties for enforcing such orders. This power was subsequently, in 1798, transferred to two justices; and in 1853, like power was given, concurrently, to towns, and thus it remains. In 1789, an act was passed making the owners of dogs liable for all damage they might do to sheep, "although such owner or owners may not have known such dog or dogs to be accustomed to do such mischief,"—thus abrogating the common-law doctrine of *scienter*. Nine years afterwards, in 1798, the statute in question was passed, abrogating it as to persons and property generally, and both remained on the statute-book till the revision of 1821, when that expressly relating to sheep was omitted, and the general and comprehensive one of 1798 retained. It is not to be supposed that the revisors or the legislature of 1821 intended to withdraw any protection from sheep, or that they deemed them more entitled to it than

men, or that the change was made in favor of property in dogs; or for any other reason than because they were engaged in the work of simplifying and condensing the laws, and thought the statute in question broad enough to cover the whole ground, and therefore omitted the others.

A new trial is not advised:

In this opinion the other judges concurred.

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**DOGS, PROPERTY IN:** See *Wheatley v. Harris*, 70 Am. Dec. 258, and note citing the principal case; *State v. McDuffie*, 69 Id. 516. The principal case is cited in *Blair v. Forehand*, 100 Mass. 141, to the point that dogs have always been held by American courts to be entitled to less legal regard and protection than more harmless and useful domestic animals.

**OWNER OF DANGEROUS ANIMAL IS LIABLE** for any damage done by him, after notice of one act of misbehavior: *Kittredge v. Elliott*, 41 Am. Dec. 717, and note; *Hinckley v. Emerson*, 15 Id. 383, the animal in this case being a dog.

**DOG, WHETHER PERSON MAY COMMIT TRESPASS** by entering alone upon the land of one not the owner: See note to *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 256.

**DOG, WHEN MAY BE KILLED**, and the killing justified: *Hinckley v. Emerson*, 15 Am. Dec. 383; note to *Tonawanda R. R. Co. v. Munger*, 49 Id. 200; *Brown v. Carpenter*, 62 Id. 603.

**DOG, WHEN BECOMES NUISANCE:** *Brown v. Carpenter*, 62 Am. Dec. 603, and note 605; note to *Loomis v. Terry*, 31 Id. 310.

**LIABILITY OF OWNER FOR DAMAGES** done by his dog: *Hinckley v. Emerson*, 15 Am. Dec. 383; note to *Loomis v. Terry*, 31 Id. 310; and those to *Sherfey v. Bartley*, 67 Id. 597-599.

**DOG, ACTION FOR INJURIES TO, WHEN LIES:** See *Dodson v. Mock*, 32 Am. Dec. 677; *Perry v. Phipps*, 51 Id. 387; *State v. McDuffie*, 69 Id. 516, and notes to these cases; *Wheatley v. Harris*, 70 Id. 258.

**DOG, INJURY BY, WHEN NOT NECESSARY TO ALLEGE OR PROVE SCIENTER:** See *Angus v. Radin*, 8 Am. Dec. 626.

**NEGLECT OF OWNER OF VICIOUS DOG** renders him *prima facie* liable to every person who is injured by such animal, after notice of its vicious disposition. It does not, however, render him absolutely liable. His negligence will not render him liable, if the negligence of the injured party contributed to such injury: *Williams v. Moray*, 74 Ind. 28, citing the principal case. And in case of a mad dog, there can be no presumption that his rabid condition is the owner's fault, unless he has reason to believe that the dog had been bitten by a rabid creature, and had neglected to restrain or destroy him afterwards. In such case, the common law would afford suitable remedy: *Elliott v. Herz*, 29 Mich. 203. The proneness of the dog to madness is one of the chief causes which has led to the statutory regulations concerning him: Id. 205, also citing the principal case.

**ALTHOUGH MAN MAY HAVE SUCH RIGHT** of property in a dog as to entitle him to maintain an action for its unlawful taking or destruction, yet he can

have no such property in the dog as could be the subject of a prosecution for larceny at common law: *Town of Wilton v. Town of Weston*, 48 Conn. 336, citing the principal case.

WHOLE CASE CANNOT BE BROUGHT UP for review, but only the particular matter complained of in the admission or rejection of evidence, or the rulings of the court upon questions of law arising in the case: *Open v. Peabody*, 36 Conn. 91, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Holt v. Roe*, 38 Ohio St. 345, where it was held that although dogs are included in the general mass of taxable property, they may be subjected to an additional per capita tax.

**CASES**  
**IN THE**  
**COURT OF ERRORS AND APPEALS**  
**OF**  
**DELAWARE.**

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**COOK v. GRAY.**

[2 HOUSTON, 455.]

**REPEAL OF REPEALING STATUTE—OBLIGATION—REMEDY.**—Contract of specialty was entered into, and judgment rendered, under a statute declaring that no writ of *capias ad satisfaciendum* should in any case be issued upon a judgment recovered by a party not at the time a resident of the state, without an affidavit of fraud against defendant. Subsequently a statute was passed repealing the above requirement, and containing no saving clause as to pending suits. After this a writ of *capias ad satisfaciendum* issued on the judgment without such affidavit of fraud. *Held*, that the repealing statute did not impair the obligation as to bail, but merely modified the remedy.

**LEGISLATURE, WHILE IT CANNOT IMPAIR OBLIGATION,** may, at pleasure, regulate the remedy, both as to past and future contracts.

**RULE THAT IN ABSENCE OF EXPRESS EVIDENCE** of legislative intent that a law should operate retrospectively, the court will not so construe it, has no application to a repealing statute not affecting vested rights, merely operating on the remedy, and containing no saving clause as to pending suits. Such statute will have a retroactive operation.

**THE** opinion contains the facts.

*Patterson and Bayard*, for the plaintiff.

*Bates and Comegys*, for the defendant.

By Court, GILPIN, C. J. This case comes up on a case stated, and questions reserved for hearing before all the judges.

It appears from the record that the plaintiff, Andrew D. Cook, instituted suit against one George Goss, on the 12th of July, 1856; that Andrew C. Gray became the special bail of

Goss on the 10th of September, 1857; and that judgment was recovered against the latter on the 23d of November, 1859.

On the 14th of March, 1860, a writ of *ca. sa.* was sued out against Goss, returnable to the next May term, which in due course was returned by the sheriff *non est inventus*. Both Cook and Goss were non-residents of this state at the time the judgment was recovered.

A writ of *scire facias* was sued out against Andrew C. Gray, as special bail, on the 10th of June, 1860, returnable to the November term following.

At the time Mr. Gray became special bail, the fifty-second section of chapter 111 of the revised statutes of this state was in full force.

By the concluding paragraph of this section, it is declared that no writ of *capias ad satisfaciendum* shall, in any case, be issued upon a judgment at the suit of a person not at the time such judgment is recovered residing within this state, without an affidavit of fraud first made and filed, as thereinbefore is specially provided. Afterward, on the 21st of February, 1859, for reasons not generally understood, the legislature was induced to repeal the said concluding paragraph of section 52. This was done after the entering of special bail, and before the recovery of judgment against Goss. The repealing act contains no saving as to pending suits; it merely declares that "the concluding paragraph, being the last six lines of section 52 of chapter 111 of the revised statutes of the state of Delaware, be and the same hereby is stricken out and repealed."

No affidavit of fraud was made and filed by the plaintiff prior to the issuing of the writ of *capias ad satisfaciendum*; and this circumstance, in connection with the construction to be given to the act of the legislature of the 21st of February, 1859, has given rise to the controversy in this suit,—a controversy involving a consideration of the power of a state to change or modify, by legislation, the remedies given by the existing law for the enforcement of contracts.

Upon this state of facts two questions have been submitted for our decision: 1. Whether the repealing statute of the 21st of February, 1859, impairs the obligation of the contract entered into by the defendant, as special bail; 2. Whether the said repealing statute should be so construed as to give to it a retrospective operation. Both of these questions have been very elaborately and ably argued by counsel on both sides; and most of the authorities having a bearing upon the



subject have been brought to our attention. We propose to consider these questions in the order in which they have been presented.

In regard to the first, it may be proper to observe generally that a distinction is taken in the books between a contract and the obligation of a contract. Indeed, the distinction seems so manifest from the very terms of the constitution, as to require no aid from judicial interpretation or authority to support it. A contract is defined to be a compact between two or more persons; or an agreement to do or not to do a particular thing. It matters not whether the contract be executed or executory,—expressed in terms or implied by law. It may in form be a grant, which in effect is a contract, but a contract executed, the obligation of which continues to exist for its protection. The constitution makes no discrimination whatever between different kinds or classes of contracts. By its terms and its spirit, it comprehends and takes under its protection all that are valid of every description.

The obligation of a contract, that is to say, the civil obligation,—for this alone as distinguished from the merely moral obligation is intended to be protected by the constitution,—is that law which binds a party to perform his undertaking; and it consists in the effective force of the law which applies to and compels performance of the contract, or a compensatory equivalent in the way of damages for non-performance. It is not in the contract itself that the obligation as an inherent quality can properly be said to reside, but in the law of the contract.

The broad and unqualified doctrine that the existing laws of a state enter into and form an essential part of the contract would, it seems, if carried out to its logical results, operate most injuriously in restraint of the legislative power of the states over subjects hitherto considered as being clearly within their legitimate jurisdiction. Do all the laws of the state enter into and form part of the contract? If not all, then what portion of them? And where are we to draw the line of discrimination between those that enter into the contract, as one of its conditions or stipulations, and those which do not? This, at least, is certain: the doctrine that the law of the remedy enters into the contract finds no sanction in the decisions of Chief Justice Marshall or the other great judges of his day; and the only decisions which seem to give countenance to such a doctrine are of comparative modern origin,

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and claim a different paternity. It would appear, therefore, to be the part of wisdom to adhere to the old doctrine that whilst the laws of a state where a contract is made determine its validity, construction, and obligation, they do not in fact enter into and become an essential part of the contract itself.

The distinction between the obligation of a contract and the remedy for its enforcement ought to be considered as well established. It was first authoritatively settled in the year 1819, in the case of *Sturges v. Crowninshield*, 4 Wheat. 122. Chief Justice Marshall, who delivered the decision of the court in that case, says that "the distinction is founded in the nature of things, and that without impairing the obligation of the contract the remedy may certainly be modified as the wisdom of the legislature shall direct." And this doctrine has been recognized and affirmed by a long series of decisions from that day to this.

In the case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 581, Mr. Justice McLean declares "that after a careful examination of the questions adjudged by the supreme court, they seem not to have decided, in any case, that the contract is impaired, within the meaning of the federal constitution, where the action of the state has not been on the contract." Even as late as the case of *Butler v. Pennsylvania*, 10 How. 416, the supreme court say that the contracts designed to be protected by the tenth section of the first article of the constitution of the United States are "contracts by which perfect rights—certain, definite, fixed, private rights of property—are vested." What vested right, what property, can a party have in a mere remedy? The same distinction between the obligation and the remedy is to be found in *Mason v. Hails*, 12 Wheat. 370. Also in *Bronson v. Kinzie*, 1 How. 315, where Chief Justice Taney says: "A state may undoubtedly regulate at pleasure the mode of proceeding in its courts, in relation to past contracts as well as future." So also in *McCracken v. Hayward*, 2 Id. 608, in which Judge Baldwin concedes the power of the state to "prescribe and shape the remedy." We might cite many other authorities, but it is not our purpose to go into a critical examination of the numerous decisions bearing more or less directly on the question, which have been made in the federal and state courts. The distinction may, perhaps, be considered a nice one, and it may sometimes be very difficult to determine whether a law affects the remedy or impairs the right.

Nevertheless, without undertaking to criticise the wisdom of the distinction, it is surely enough for us to know that it has been authoritatively settled and uniformly held by the federal tribunals. But whilst I say this, I must in candor admit that the cases of *Bronson v. Kinzie*, 1 How. 315, and *McCracken v. Hayward*, 2 Id. 608, go further in favor of the theory that the existing law is incorporated into the contract than any of the cases which preceded them; and that they have a tendency, especially the latter, to confine the operation of the distinction between the right and the remedy within narrower limits than is justified by previous decisions in the same court.

It is, however, worthy of remark, in respect to these cases, that they might have been decided on other grounds, without touching the constitutional question; that the court was not unanimous; that they were decided without argument on the constitutional question; and that, in fact, they constitute an unwise departure from the settled practice of the court, never to decide so grave a question as the constitutionality of a state law, unless the question were necessarily involved in the decision of the case before the court. In neither of these cases was the question of the constitutionality of the laws of Illinois properly before the court for its decision.

By the act of Congress of the 29th of September, 1789, it was provided "that the forms of writs and executions, except their style, in the circuit and district courts in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same." And by the act of the 8th of May, 1792, this provision is substantially re-enacted, "subject to such alterations and additions as the courts respectively shall in their discretion deem expedient."

On the 2d of March, 1793, Congress, by another act, declared in substance that writs of *fi. fa.*, issuing out of the courts of the United States, should, as to their execution and the appraisement of property taken under them, conform to the practice in similar proceedings in the state courts.

Under this state of the law, the cases of *Wayman v. Southard*, 10 Wheat. 2, and *Bank of United States v. Halstead*, Id. 51, arose, involving, as it was thought, the constitutionality of certain laws of the state of Kentucky in relation to execution process; but the supreme court of the United States held that the acts of Congress of 1789 and of 1792 did not apply to states subsequently admitted into the Union; and that as the Kentucky statutes had not been adopted by the circuit court

of the United States for the state of Kentucky, they did not apply to the United States courts. The supreme court, therefore, declined to decide the question of the constitutionality of those laws.

In consequence of these decisions, Congress passed the process act of May 19, 1828, which declares "that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same as are now used in the courts of the states." And it provided "that it should be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislature of the respective states for the state courts."

By this law of 1828, the circuit court had authority to adopt the Illinois statutes in regard to final process. But its authority was to adopt them as a whole, and not in part only. The circuit court, however, undertook to alter and adopt them in part only, which was not warranted by the act of Congress of 1828, and so the supreme court held. Hence there was no adoption of the Illinois statutes according to the meaning of the act, and the question of their constitutionality was not legitimately before the court for adjudication. And yet a majority of the judges assumed, contrary to the settled practice of the court, to decide without argument a grave constitutional question not properly before them, and the deciding of which was not necessary to the decision of the cases before the court. Judge McLean, in dissenting from the opinion of the majority of the court, says that the points certified from the circuit court "would be answered by saying that the acts of the legislature referred to can have no operation in the case." And he expresses his regret that the court deemed it "necessary or proper to consider the constitutionality of the above acts, and holding them unconstitutional,"—the decision of the matters before the court not requiring this judgment. And he remarks, "It is the more to be regretted, as there was no argument, written or oral, to sustain these laws."

Mr. Justice Catron says, in the case of *McCracken v. Hayward*, 2 How. 608: "I have formed no opinion whether the statute of Illinois is constitutional or otherwise. The question raised on it is one of the most delicate and difficult of any presented to this court; and as our decision affects the state courts throughout in their practice, I feel unwilling to form or

express any opinion on so grave a question, unless it is presented in the most undoubted form, and argued at the bar."

Under these circumstances, we may well view with caution the tendency of these decisions to ignore, to some extent, at least, the distinction between the right and the remedy,—a tendency which finds no sanction in the previous decisions of the court, and which, as it appears to us, would be both unsound and unwise to follow.

It has been insisted for the defendant that the fifty-second section formed part of the contract of bail, and that as a consequence the making and filing an affidavit of fraud, as prescribed by that section, became a condition precedent to the issuing of the writ of *capias ad satisfaciendum*. If this position be sound, the plaintiff must fail.

But it is to be remarked that the entire chapter to which the fifty-second section belongs has relation to the remedy,—its whole object being to regulate execution process. Now, all the processes in a cause, whether original, mesne, or intermediate or final, are of the remedy. In a general or comprehensive sense, the term "process" signifies all the proceedings in action, from its inception to its conclusion. All that the legislature has done has been to alter the mode of procedure,—to do away with the affidavit of fraud, which before the repeal was but one of a series of steps or processes, each tending to the same end, and all belonging to the remedy. If arrest and imprisonment are of the remedy, as it must be conceded they are, why is not the affidavit of fraud of the same character? And if it is competent, as it undoubtedly is, for the legislature to abolish imprisonment as to past contracts, without impairing the obligation, why may not the state by the same instrumentality constitutionally dispense with an affidavit of fraud? We confess ourselves unable to discover any satisfactory reason why it may not do so.

We think, therefore, that the repealing statute did not touch the obligation, but merely modified the remedy. Having arrived at this conclusion, it remains for us to consider the second question, as to whether, according to the settled rules of construction, the repealing statute can be given a retrospective operation. Whether it is just or wise, as a general thing, to pass retrospective laws, is not the question. We must be content to administer the law as we find it settled by authority, and not as we would have it to be. We have abundant authority for saying that the states may enact such laws.

Nothing certainly can be found either in the federal constitution or the constitution of this state prohibiting them, unless they are properly *ex post facto* laws, or laws impairing the obligation of contracts. Subject to these exceptions, the constitutional powers of the state cannot be doubted.

But it is contended that, in the absence of express evidence of legislative intent that the law should operate retrospectively, the court will not so construe it. And this is true as a general proposition, but it is not so universally, as we shall presently endeavor to show.

Numerous cases have been cited by the counsel for the defendant in support of this position, all of which have been carefully examined: *Gillmore v. Shooter*, 2 Mod. 310; *Couch v. Jeffries*, 4 Burr. 2460; *Moon v. Durden*, 2 Exch. 33; *Dash v. Van Kleeck*, 7 Johns. 477 [5 Am. Dec. 291]; *Johnson v. Burrell*, 2 Hill, 238; *People v. Carual*, 6 N.Y. 463; *Boyd v. Barrenger*, 23 Miss. 269; *Plumb v. Sawyer*, 21 Conn. 351; *Bedford v. Shilling*, 4 Serg. & R. 401 [8 Am. Dec. 718].

Whilst we find no fault whatever with the law of these cases, it is proper to remark that they differ from the case before us in very important particulars. They are all, I think, without exception, cases relating to positive enactments, and involving vested rights, of one kind or another. The case which we are called on to decide is the case of a repealing statute, involving no right of the defendant, either vested or inchoate, but simply effecting a modification of the plaintiff's remedy.

The authorities clearly distinguish between these different kinds of statutes as to the construction to be given them. Hence we find the rule which, as to positive enactments, requires express evidence of legislative intent in order to give them retroactive effect, has been held not to apply to repealing statutes. Indeed, it would seem that the simple fact of an absolute repeal of a former statute, without any express saving clause, is so inherently significant of an intent to do away utterly with everything which may have arisen under the abrogated statute, unless protected by the prohibitions of the federal constitution as to require the courts to give the repealing act a retroactive operation: *Butler v. Palmer*, 1 Hill, 324. Dwarris, in his treatise on statutes and their construction, page 676, declares, as the result of the English cases, that "when an act of Parliament is repealed, it must be considered, except as to transactions passed and closed, as if it had never existed." And Chief Justice Tindal, in speaking of the effect



of a repealing statute, says: "I take it to be, to obliterate the statute repealed as completely from the records of Parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law": *Key v. Goodwin*, 4 Moore & P. 341; *Surtees v. Ellison*, 9 Barn. & C. 750; *Maggs v. Hunt*, 4 Bing. 212; *Key v. Goodwin*, 6 Id. 576; *Miller's Case*, 1 W. Black. 451; *Rex v. Justices of London*, 3 Burr. 1456.

The same doctrine is recognized by the supreme court of the United States in *Yeaton v. United States*, 5 Cranch, 281, and in *Schooner Rachel v. United States*, 6 Id. 329, where it was held that the repeal of a statute giving a penalty puts an end to all actions pending for penalties under the act at the time of passing the repealing statute. And this doctrine applies as well to civil as criminal proceedings: *Butler v. Palmer*, 1 Hill, 324; *Stoeber v. Immell*, 1 Watts, 258; *Hampton v. Commonwealth*, 19 Pa. St. 329.

We do not mean to be understood as maintaining that the power of the legislature over the remedy is unlimited. To abrogate all process, and thus take away all remedy, would amount to an actual denial of justice, and would in effect impair the obligation of contracts. In this case, however, neither the right nor the remedy is impaired; on the contrary, the latter is merely improved and facilitated.

Considering that the repealing act of February 21, 1859, did not impair the obligation of the contract of bail, nor interfere with any vested or inchoate right of the defendant, we are of opinion that the plaintiff is entitled to recover, and we shall therefore so certify to the superior court for New Castle County.

All the judges concurred in the foregoing opinion, with the exception of Wooten, J., *dubitante*, but who expressed no dissenting opinion.

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POWER OF LEGISLATURE OVER REMEDY: See *Coriell v. Ham*, 61 Am. Dec. 124; *Lord v. Chadbourne*, 66 Id. 290; *Von Baumback v. Bade*, 76 Id. 283; *Reapers' Bank v. Willard*, Id. 755, and cited cases in note thereto. As to repealing statute, see *Coffin v. Rich*, 71 Id. 559, and note. As to amendatory act, see *Whipple v. Farrar*, 64 Id. 99. As to past or future contracts, see *Baughner v. Nelson*, 52 Id. 694, and note 702; *Von Baumback v. Bade*, 76 Id. 283, and note 293. As to affecting vested rights, see *Coffin v. Rich*, 26 Id. 559, and note 567.

REPEAL OF STATUTE, effect on pending actions: See note to *Stephenson v. Doe*, 46 Am. Dec. 496; *Abbott v. Commonwealth*, 34 Id. 492, and note.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**FLORIDA.**

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**TRUSTEES OF INTERNAL IMPROVEMENT FUND v.**  
**BAILEY.**

[10 FLORIDA, 112.]

**OWNER OF BONDS IN INTERNAL IMPROVEMENT FUND**, issued by virtue of the Florida act of January 6, 1855, and known as the "Internal Improvement Act," may enjoin the trustees of such fund from applying it to any other purposes than those specified in the act, so as to endanger his claim by lessening his security; even though such application should be under the command of a subsequent act of the legislature.

**LEGISLATURE CAN CONSTITUTIONALLY PASS NO ACT** impairing the obligation of contracts, and when it attempts to do so, it is the solemn duty of the judicial department to declare such law null and void.

**WHEN LAW IS IN ITS NATURE** a contract, and when absolute rights have vested under it, a repeal of the law cannot divest those rights.

**LEGISLATURE MAY BY ACT** convey in trust, pledge, or mortgage for the benefit of those who may aid in the construction of certain "internal improvements," a fund already existing and possessed by the state. It is not necessary to designate in the act all of the improvements to be aided by such fund; some may be mentioned and others postponed until those first designated are put into successful operation. The trustees of the fund created by the act cannot be heard to impeach it.

**THE** opinion contains the facts.

*Baltzell and Woodward*, for the appellants.

*Papy*, for the appellee.

By Court, WALKER, J. The complainant in the circuit court for Middle Florida asked, by his bill filed in this case, that the trustees of the Internal Improvement Fund be restrained from appropriating any portion of said fund to the

clearing out of the mouth of the Apalachicola River, claiming that such appropriation would be in derogation of his right as a large bond-holder under the act of January 6, 1855, creating said fund and providing for the existence of said trustees.

The trustees answer, among other things, that they are expressly commanded to make the appropriation complained of by an act of the general assembly of February 14, 1861.

The cause was submitted on bill, answer, and exhibits, and the judge of the middle circuit having granted and perpetuated the injunction as prayed for, the case is brought before this court by appeal.

The questions presented by the record for our consideration are: 1. Did the general assembly of 1855 have the power to pledge the Internal Improvement Fund as it did, to aid in the construction of certain roads, etc.? 2. If they had the power to make such pledge, would any subsequent general assembly have the power to divert any portion of said fund to other purposes than those designated in the act of 1855? 3. Is the appropriation sought to be enjoined by the appellee in derogation of his rights as a bond-holder under the act of 1855? and 4. If so, has he a remedy by injunction against the trustees?

It was argued at the bar that the general assembly could not pledge the Internal Improvement Fund as it did in the act of 1855, because the eleventh section of the thirteenth article of the constitution declares that the general assembly shall not pledge the faith and credit of the state to raise funds in aid of any corporation whatever. But to our minds the difference between appropriating or pledging a fund already raised by the gift of the United States to the state of Florida, and the pledging of the faith and credit of the state to raise funds not yet in existence, is too manifest to admit of much argument. It is very clear that the general assembly could not issue what are known as "faith bonds" in the banking history of this country, thereby pledging the faith and credit of the state to raise funds in aid of any corporation; but we think it equally clear that the general assembly may convey in trust, pledge, or mortgage, for the benefit of those who may aid in the construction of certain internal improvements, a fund already existing and possessed by the state through the cession of the United States; and more firmly are we of this opinion when we read the second clause of the eleventh article of our state constitution, which declares thus: "A liberal system of internal improvements, being essential to the develop-

ment of the resources of the country, shall be encouraged by the government of the state, and it shall be the duty of the general assembly, as soon as practicable, to ascertain by law proper objects of improvements in relation to roads, canals, and navigable streams, and to provide for a suitable application of such funds as may be appropriated for such improvements."

Nor is it a valid objection to the act of 1855, that it does not designate one or more rivers for improvement as well as a canal and certain railroads. It surely could not have been the expectation of the framers of the constitution that the general assembly would be able at any one time to designate all the improvements that were through all time to be aided by this magnificent fund; on the contrary, the general assembly were to do this "as soon as practicable," and as we think, from time to time, as the means at their command would justify it.

It is very evident that if the general assembly had at one time provided for the building of all the roads, the digging of all the canals, and the clearing out of all the navigable streams, it would ever be desirable to build, dig, and clear out, that the scheme would have been so gigantic, and the fund subjected to such a multitude of drains at the same time, as effectually to discourage capitalists from investing their funds in aid of any improvements whatever. But the general assembly, as we think, took a wise view of the constitution, and therefore designated in the beginning only a few grand objects, vital to the whole state, for improvement, leaving others to wait for their share of state aid until those first inaugurated should have passed successfully through the fiery ordeal of their difficult and doubtful struggle into existence. Accordingly, the general assembly of 1855 designated for state aid, in the first instance, only a line of railroad from Jacksonville to Pensacola, from Fernandina to Tampa Bay, with a branch to Cedar Key, from Tallahassee to St. Marks, and a canal between Indian and St. Johns rivers. After these roads should be built and prove a success, by being able for five consecutive years to pay six per cent on the capital stock paid in, and the interest on the bonded debt and one per cent yearly to a sinking fund on said debt, "then," as provided by section 27, "the trustees of the Internal Improvement Fund may apply, under the direction of the legislature, the annual income arising from said fund to other purposes of internal improvement,"

etc. So it will be seen that it was not the design to absorb the whole fund in aiding the designated improvements to the exclusion of all others, but only to postpone all others till those first designated should have been put into successful operation. This we clearly think the general assembly had the right to do.

But it was also objected to the act of 1855, that it is in violation of the act of Congress ceding the lands composing the Internal Improvement Fund to the state of Florida. We will not discuss this question; it is enough for us to know that the trustees, the appellants here, derive their existence entirely from the act of 1855. They are its creatures, and cannot be heard to complain that the author of their being did not give them greater powers or less, or did not frame them in any wise different from what they are. They must execute the law as they find it, and if they deem it so fraught with folly, fraud, or injustice that they cannot consent to superintend its operations, we know of no escape for them, except in resignation.

It was further objected against the act of 1855, that the power reposed by the constitution in the legislature over the lands composing the Internal Improvement Fund could not be delegated to the trustees, it being a matter of personal confidence and discretion; but, as we have before stated, the trustees, the appellants, cannot be heard to impeach the very act which gives them existence; and besides, if they could succeed in showing that the general assembly of 1855 could not delegate the powers contained in that act, would they not show at the same time that the general assembly of 1861 could not delegate similar powers in the very act under which they claim the right to make the appropriation complained of? It seems to us that this alone is sufficient answer to this objection. But we will state further on this head, that the state can contract and be contracted with, and carry on the operations of her government only through the instrumentality of her agents; and of course her legislature must have authority to delegate to her agents such powers as will enable them to carry out her constitutional wishes. No better illustration of this can be found than that afforded by the case before us. The legislative department is required by the constitution "to encourage a liberal system of internal improvements," to "ascertain proper objects of improvement, and to provide for a suitable application of such funds as may be appropriated for such improvements." How could these requirements of the constitution be

complied with, except by delegating the necessary powers to trustees or agents? It is impossible.

We conclude, therefore, after mature reflection on the first point, that the general assembly of 1855 did have the power and right under the constitution to pass the internal improvement act of that year; that they did have the power and right to convey the lands and money composing the Internal Improvement Fund to trustees, to be held in pledge, mortgage, or trust, for the payment of the interest of the bonds authorized by said act, and the other purposes therein enumerated.

Nor can we persuade ourselves that the general assembly of 1861 had the power to interfere in the slightest degree with any rights which have become vested under the act of 1855. By that act, all the Internal Improvement Fund is conveyed to trustees for certain purposes therein named, among which is the payment of the interest on certain bonds, such as those now held by the appellee. And now that said bonds have been issued, and have passed for a valuable consideration into the hands of *bona fide* holders, who have taken them from motives of patriotism, and upon the faith both of constitutional provisions and legislative enactments; now that our roads have been in a great measure built with the very money furnished by the holders of these bonds, and the whole state is rejoicing in the use of them,—surely it would be in the last degree wrong for a subsequent legislature to say in effect, by their act, to the bond-holders: We have gotten all out of you we wanted; we have gotten your money, and built our roads with it, and now we will take the fund which we solemnly and irrevocably pledged to the payment of your interest, and appropriate it to the making of other improvements. But such is not the law. The state is as capable of making a contract as an individual is, and when made, is as much bound by it.

The legislative department can constitutionally pass no law impairing the obligation of her contracts, and when it attempts to do so, it is the solemn duty of the judicial department, co-equal and co-ordinate with the legislative, each being supreme in its own sphere in the constitutional system, to declare such law null and void.

When the general assembly of 1855 conveyed the internal improvement fund to trustees for the benefit of the purchasers and holders of the bonds to be issued under it, and for the other purposes therein named, they made a law in the nature of a contract; and the supreme court of the United States, in

*Fletcher v. Peck*, 6 Cranch, 87, say: "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights"; see also *Terrett v. Taylor*, 9 Id. 43, and *Winter v. Jones*, 10 Ga. 190 [54 Am. Dec. 379].

The act of 1861 is an attempt to repeal the act of 1855, in so far as it seeks to divest the Internal Improvement Fund from the purposes therein indicated, which, as we have shown, cannot be done, since rights have become vested under it.

The next question in order is, Would the appropriation sought to be enjoined be in derogation of the right of the complainant as a bond-holder, under the act of 1855? We think it would. The clearing out and improving the channel of the Apalachicola River is not one of the internal improvements designated in said act. All the fund having been appropriated, for the present, to the purposes mentioned in the act, it follows of course that the rights of those who have purchased bonds on the faith of that appropriation would be violated if any portion of the fund should be applied to any other purpose so as to endanger their security.

But it has been argued that the Internal Improvement Fund is a vast one, consisting originally of about twelve millions of acres, and that the portion which the trustees are about to appropriate to another object is so small as not to affect the safety of the bond-holders. We are not satisfied of this. An exhibit in the case shows that the amount of bonds already issued under the act of 1855 is \$3,512,860. We are not informed how much has been appropriated to the Indian River Canal, nor are we informed how much it will take to clear out the Apalachicola River,—whether twenty, fifty, or a hundred thousand dollars; but we are inclined to think, from the figures before us, that no money can at present be spared from the Internal Improvement Fund for other purposes than those indicated in the act of 1855; and besides, this is not a question of ability, but of principle, for if it be once conceded that the fund may be applied to other purposes than those named in the act, there will be no limit, and in a short time we should probably see the whole fund frittered away on a thousand local enterprises, and the object of the constitution in requiring a system of internal improvements to be adopted would be entirely defeated. Instead of having that great constitutional system which was designed by James T. Archer, one of the purest men and brightest intellects that ever adorned and

blessed the state, in conjunction with other great men whose names may be associated with his after death; instead of that system which has enabled the state of Florida, the weakest in population among her sisters, to build more railroad in the same length of time than any other state in the world; instead of that system which in a few years has connected by railway Jacksonville with Quincy, Tallahassee with St. Marks, and Fernandina with Cedar Keys, which is rapidly opening the canal between the Indian and St. Johns rivers, and has graded the road in the direction to Tampa as far as Ocala, and promises in a short time after peace shall again smile on our land to complete the road to Tampa in the south and Pensacola in the west, and then leave a fund sufficient to make all other improvements in the state that may be desirable; instead of this system which has done so much and promises to do so much more, if we permit the fund to be applied to new, disjointed, fragmentary enterprises, unconnected with any system,—we shall see the whole fund exhausted, nothing great accomplished, and our constitution, together with the pledged honor of the state to bond-holders, violated.

The only question remaining is, whether the complainant has a right to the remedy by injunction prayed for against the trustees. It has been argued that he has not, because the trustees represent the state, which cannot be sued. It is true, the state cannot be sued, but where the state appoints an agent or trustee to pay a particular debt or class of debts, with a specific fund, it has never yet and never can be held that the party interested in the fund may not intervene by injunction to prevent such agent from appropriating the fund to an entirely different purpose. Such is the case here.

The general assembly has, in compliance with the express command of the constitution, inaugurated a liberal system of internal improvements, has ascertained by law proper objects for improvement, has appropriated certain funds for those improvements, and has provided for a suitable application of those funds to said improvements by placing the funds in the hands of the trustees, the appellants, with strict injunctions to that effect. One of the specified purposes for which the trustees hold the fund is the payment of the interest on the bonds held by appellee; and when he sees the trustees about to apply those funds to other purposes than those specified in the act of conveyance, so as to endanger his claim, by lessening his security, it is his undoubted right to have them re-



strained from doing so by injunction, and this even though the threatened misappropriation should be under the command of a subsequent act of the general assembly itself.

Let the decree of the circuit court be affirmed, with costs.

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**LAW IMPAIRING VESTED RIGHTS** or the obligations of a contract is unconstitutional and void: *Coffin v. Rich*, 71 Am. Dec. 559; *Henderson etc. R. R. Co. v. Dickerson*, 66 Id. 148, and notes to these cases.

**RIGHTS ARE NOT DESTROYED** by the repeal of the law under which they were acquired: *Dixon v. Dixon*, 23 Am. Dec. 478; see also *Bangor v. Goding*, 56 Id. 688; *Winter v. Jones*, 54 Id. 379.

**THE PRINCIPAL CASE** was again before the court on an application for a rehearing, and will be found reported in 10 Fla. 213; Id. 238. In both cases the motion was denied.

**THE PRINCIPAL CASE IS DISTINGUISHED** in *Trustees etc. v. Gleason*, 15 Fla. 399; and in *Gonzales v. Sullivan*, 16 Id. 817, 818, it is approved as to the first paragraph of *syllabus, supra*, but at the same time held not to apply in that case.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**GEORGIA.**

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**TAYLOR v. JETER.**

[28 GEORGIA, 195.]

**FATHER IS NATURAL GUARDIAN OF HIS MINOR CHILD BORN IN WEDLOCK, and as such is entitled to its custody and management.**

**GRANT TO FATHER OF LETTERS OF GUARDIANSHIP OVER PERSON AND PROPERTY OF HIS MINOR CHILD, born in wedlock, and made by a court of competent jurisdiction, where the child and father were domiciled, strengthens the claim of the latter when contested beyond that jurisdiction.**

**WIFE HAS NO POWER TO APPOINT TESTAMENTARY GUARDIAN FOR HER CHILD, being also the child of her husband, who still lives, after a judgment or decree divorcing the husband and wife *a vinculo matrimonii*, and giving the custody and education of the child of the marriage to the wife.**

**TESTAMENTARY GUARDIAN CANNOT, BY WILL, TRANSFER CUSTODY of his ward to another.**

**PLACE OF CHILD'S BIRTH IS IN LAW ITS DOMICILE, if it was at the time of the birth the domicile of its parents.**

**DOMICILE OF BIRTH OF MINOR CONTINUES until the child has obtained a new domicile.**

**MINOR IS INCAPABLE OF CHANGING HIS DOMICILE DURING MINORITY, and must therefore retain the domicile of his parents.**

**MINOR'S DOMICILE CANNOT BE CHANGED BY ACT OF STRANGER in wrongfully removing his person; as when such removal takes place without the consent of the minor's father, who still lives.**

**COURTS EVERYWHERE, ON HABEAS CORPUS PROCEEDINGS, TO OBTAIN CUSTODY OF INFANT, WILL TAKE CARE not to commit such child to improper or unsafe custody; and will look with an eye single to the interests of the minor. Courts will recognize the father as the child's natural guardian, unless he is shown to be an unfit and unsafe custodian; and where a state court of competent jurisdiction determines that the father is a fit and proper custodian of his minor child, the courts of a sister state will not disturb his authority, except upon the most overwhelming evidence**

of his unfitness to occupy this relation. Especially are these doctrines applicable where the child has been removed by a stranger from the domicile of his father to a foreign state without the consent of the latter.

**HABEAS CORPUS** to place custody of minor child. The custody of the infant was awarded to the applicant, Samuel Jeter. Other facts are sufficiently stated in the opinion.

*B. Hill*, for the plaintiff in error.

*Wiley Williams*, contra.

By Court, JENKINS, J. This is a contest between the father and a maternal uncle of a child under fourteen years of age (the mother being dead), for the custody of the child. The case came before the court on a return to a writ of *habeas corpus* sued out in Marion County by the father against the uncle. The answer admits the possession in respondent of the child, and asserts his right to such possession.

The court below awarded the possession of the child to the father (plaintiff in *habeas corpus*), and the respondent excepted.

The record discloses the facts that at the birth of the child Oscar T. Jeter, the subject of litigation, his parents were domiciled in Chambers County, Alabama; that they, with the child, continued to reside in that county and state until the death of the mother, early in the year 1860, when, or shortly thereafter (the father then and still residing there), respondent, who resided and now resides in Marion County, Georgia, without the consent of the father, removed the child to the latter county and state.

The defendant in error, who was the promovant below, rests his claim to the custody of the child: 1. Upon his natural guardianship, the result of paternity; 2. Upon an order and judgment of court of probates of Chambers County, state of Alabama, appointing him guardian of the person and property of the child after the death of the mother, to wit, in December, 1860.

This evidence unquestionably makes a *prima facie* case for the defendant in error.

1. It were a useless expenditure of time and labor to adduce either argument or authority in support of the general proposition that the father is the natural guardian of his own minor child, and as such entitled to its custody and management.

2. And again, if that right were in this case imperfect, it received judicial recognition and confirmation in the order and judgment of the court of probates of Chambers County,

Alabama (wherein the minor was born and domiciled), appointing the defendant in error guardian of the person and property of his child. We assume, now, that the domicile of the child was unchanged at the time of this appointment. That proposition will be fully discussed in considering the case made by the plaintiff in error, to which we now proceed.

The plaintiff in error relies for his defense: first, upon documents drawn from the records of Chambers County, Alabama, viz.: 1. A decree in chancery, whereby, at the suit of Sarah Jeter (the mother), she was divorced absolutely from Samuel Jeter, the father, and the custody of the child awarded to her; 2. Her last will and testament, appointing James Taylor (her father) guardian of Oscar T.; and 3. The last will and testament of said James Taylor, appointing plaintiff in error his guardian. Second, upon the order and judgment of the court of ordinary of Marion County, Georgia, appointing him guardian of the person of said Oscar T. Third, how far, then, do the Alabama records avail him to overcome the claim set up by the defendant in error? In the absence of the decree in chancery, it is not pretended that the mother could, by last will and testament, appoint a guardian for the child, the father surviving her. Whether or not she could do so, under any circumstances, in Alabama, we need not consider. In Georgia, there is an enabling statute authorizing widowed mothers to do so. It is enough for our purpose that in this case that authority is claimed for the mother, from the decree alone. What, then, is the decree? and what its extent and force? It is simply "that the custody and education of the child of the marriage be and the same is hereby given to the plaintiff" (the mother). It does not dissolve the relation of parent and child between Samuel and Oscar T. Jeter,—does not bastardize the latter.

What the result would have been had the court gone further and attempted, by decree, to separate between father and child as effectually as it had done between husband and wife, to disfranchise the child forever from paternal authority, we need not pause to inquire. It is enough for our purpose that no such stringent action seems to have been contemplated; certainly none such was taken. The decree of the court annulled the marriage,—put an end to the cohabitation of the parents, and consequently to their joint control and nurture of the child of the marriage. To avoid future contest between them touching this matter, it awarded to the mother this control

and nurture, influenced, doubtless, in no small degree by the consideration that at the then tender age of the child nothing could replace a mother's assiduous nurture and plastic government. Touching the guardianship of the child, the decree settles nothing, except as between the father and mother under then existing circumstances. The court wisely left the matter to be dealt with in the future, under altered circumstances, as the interests of the child, controlled by the law of the land, might require. The mother survived the divorce a short time only, but during the brief interval exercised without let or hindrance the delegated authority. In anticipation, however, of her demise, she attempted by testamentary disposition, to devolve the guardianship of her child upon her own father, to the exclusion of his. Whence was the authority to do this derived? Certainly not from the terms of the decree. Did it then result from the nature of the office? Is the office of guardian or trustee, appointed by the chancellor, transmissible by the will of the appointee? We hold that it is not. It is a personal trust, revocable during the life of the appointee (upon a proper case made) by the rightful tribunal, and invariably terminating with that life.

In this case, however, there appears to have been no interference by the father, until after the death of the testamentary guardian appointed by the mother, which death occurred soon after her own.

4. The guardian of her testamentary appointment, James Taylor, attempted to devolve the trust, thus irregularly coming to him, upon the plaintiff in error, by like testamentary disposition. Assuming the trust, the plaintiff in error took the child into his custody, and removed him from the state of Alabama to the state of Georgia. Whatever may be said of the validity or invalidity of the first testamentary appointment, we hazard nothing in holding the second utterly void.

"A testamentary guardian cannot, by deed or will, transfer the custody of his ward to another": Shelford on Marriage and Divorce, 691, citing *Bedell v. Constable*, Vaughan, 179; *Villareal v. Mellish*, 2 Swanst. 533.

The records adduced, therefore, from the state of Alabama, do not sustain the right of the plaintiff in error to the custody of the child.

He must stand or fall upon the letters of guardianship granted him by the court of ordinary of Marion County, in the state of Georgia. It appears by his own showing that he

did not obtain the custody in virtue of this appointment, but sought to strengthen it thereby. Was this a valid appointment? It was not an appointment induced by the minor's accession to property lying in that county, or being under the control of that court. We have no evidence of such occurrence, and moreover it was a guardianship of the person only. How, then, did that court acquire jurisdiction over this minor? It becomes necessary to inquire where his domicile was.

5. The rule of law is "that the place of birth of a person is considered as his domicile, if it is at the time of his birth the domicile of his parents": Story's Conflict of Laws, sec. 46. The evidence discloses that Chambers County, Alabama, was the domicile of this child's parents at the time of his birth; that it still continues to be the domicile of his father; and that he actually remained there until a short time prior to this appointment.

6. Another rule of law is, "that the domicile of birth of minors continues until they have obtained a new domicile": Id.

7. And still another rule is, "that minors are generally incapable of changing their domicile during their minority, and therefore retain the domicile of their parents": Id.

The conclusion is, that this child has not now, nor ever has had, any domicile other than Chambers County, Alabama. He was wrongfully transferred thence to Marion County, Georgia, and as he could not change his domicile, so neither could a stranger by the wrongful removal of his person.

The plaintiff in error stands before the court in the attitude of one who tortiously seized and abducted a minor, thereby claiming to have given jurisdiction over his person to a court in Georgia, and then calling upon that court to exercise that jurisdiction in legalizing the tort. Doubtless he meant kindly, meant well, to the infant, and that may be, if not a justification, a palliation of the act in a moral point of view, but in law there is for it neither the one nor the other.

Our conclusion is, that at the time of the grant of letters of guardianship to Samuel Jeter, by the court of probates of Chambers County, Alabama, there had been no such change of domicile of the child as divested the jurisdiction of that court, and consequently none which gave jurisdiction to the court of ordinary of Marion County, Georgia. And further, that in the absence of both grants of guardianship, the father, as natural guardian, is entitled to the custody of the child.

8. It was earnestly and forcibly urged upon our considera-

tion, in the argument of counsel for the plaintiff in error, that, as appears by the evidence, the defendant in error, though occupying a paternal relation to the child, is an unfit person to be trusted with his control and education, and that courts, in their discretion, should always refuse to exercise the extraordinary power here invoked in behalf of such an applicant.

That in such cases courts should always look with an eye single to the interest of the minor, and never commit him to improper or unsafe custody, is freely admitted; but to the appeal made in this case there are sufficient replies.

1. The question of the fitness or unfitness of the applicant to be the custodian and educator of a minor does not appear to have been made in the court below. There is no allegation of his unfitness in the respondent's answer to the *habeas corpus*, nor was there any evidence directly to the point. The plaintiff in error, when before the court below, seemed to consider himself abundantly fortified by the record evidence (before recited), of his rightful guardianship. These reliances, we have already shown, cannot avail him.

Along with the exemplification of the chancery proceedings in Alabama came the evidence submitted to the chancellor. Thus it incidentally appears that there had been a matrimonial quarrel between the parents of the child, ending in the ejection by the husband from his homestead of wife and child, and a disowning of the child. Upon this evidence, thus incidentally adduced, and without any allegation of unfitness in the pleadings, the argument of counsel we are now considering is predicated.

Had the respondent to the *habeas corpus* intended to rely upon the ground of unfitness for the office in the applicant, the latter should have been notified of it by a distinct allegation in the answer, and there should have been direct, satisfactory proof adduced to sustain it. The door would then have been opened for the introduction of evidence in rebuttal. As the cause was conducted below, the applicant was warranted in supposing that the respondent intended to rely solely upon record evidence of his own superior claim to the custody of the child.

2. After the decree in chancery, and after the death of the mother, the defendant in error, induced by the consideration that the child had become possessed of considerable estate, applied to the proper tribunal in Alabama for letters of guardianship of the property as well as the person of the child. This application was resisted by another maternal uncle, a



brother of this plaintiff in error. On demurrer to the *caveat*, the court overruled it, and gave the caveator the privilege of pleading over, which was declined. The application was granted, bond and security taken, and letters issued. The vicinage wherein was the domicile of the father and the child was within the jurisdiction of that court. There the parties were known, evidence of the fitness or unfitness of the father for the guardianship easily attainable, and opposition actually made by one in the interest of the plaintiff in error, related in like manner to the minor. There should this contest have been waged,—there only could it have been waged, but for the lawless removal of the minor. Shall the courts of Georgia avail themselves of a tort to wrest from those of a sister state a jurisdiction properly appertaining to them? We say not; rather let the subject be remanded to them. The grant of guardianship by the court of probates does not, any more than did the decree in chancery, confer upon the appointee a vested title. It simply reposes in him a trust for the benefit of the infant, revocable whenever abused.

We repeat, to the courts of Alabama properly belongs this jurisdiction, with them is the responsibility which we doubt not will be well met, and to their keeping we think the court below very properly remanded this tender victim of a family feud.

Let the judgment be affirmed.

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**FATHER'S RIGHT TO CUSTODY AND MANAGEMENT OF HIS CHILDREN:** *State v. Smith*, 20 Am. Dec. 324, and note 330; note to *Mercein v. People*, 35 Id. 668; *People v. Mercein*, 38 Id. 644; *Cowls v. Cowls*, 44 Id. 708, and note 714; *State v. Baldwin*, 45 Id. 399. It is not absolute, but merely a personal trust: *Townsend v. Kendall*, 77 Id. 534; note to *Magee v. Holland*, 72 Id. 341, and note 347.

**WELFARE OF CHILD WILL CONTROL IN PLACING ITS CUSTODY.** Its interests are paramount to the right of either parent: See note to *State v. Smith*, 20 Am. Dec. 330-337; note to *Mercein v. People*, 35 Id. 668; *Cowls v. Cowls*, 44 Id. 708.

**PLACING CUSTODY OF LEGITIMATE CHILD ON HABEAS CORPUS:** Extended note to *State v. Smith*, 20 Am. Dec. 330-337; *Mercein v. People*, 35 Id. 653, and extended note thereto 668; *People v. Mercein*, 38 Id. 644; *State v. Baldwin*, 45 Id. 399. This subject is fully discussed in Church on Habeas Corpus, secs. 423-452.

**MOTHER'S APPOINTMENT OF TESTAMENTARY GUARDIAN IS VOID:** See note to *Matter of Van Houten*, 29 Am. Dec. 713, in which is cited the principal case.

**GUARDIAN CANNOT APPOINT ANOTHER GUARDIAN,** for the office is one of personal trust, and not assignable: Note to *Matter of Van Houten*, 29 Am. Dec. 714.

DOMICILE OF INFANT IS PLACE OF HIS BIRTH, if it were at the time the domicile of his parents: *Allen v. Thomason*, 54 Am. Dec. 55, and note 58; collected cases in note to *Ringgold v. Barley*, 59 Id. 112.

ONE DOMICILE IS NOT LOST UNTIL NEW ONE IS ACQUIRED: *Shepherd v. Cassidy*, 70 Am. Dec. 372, and note 374.

MINOR CHILD CANNOT, IN GENERAL, WHILE UNDER AGE, PROPRIO MARTE CHANGE ITS DOMICILE: See note to *Allen v. Thomason*, 54 Am. Dec. 58; *Grimes v. Witherington*, 63 Id. 66.

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## ALFORD v. STATE.

[88 GEORGIA, 308.]

ON TRIAL FOR HOMICIDE, JUDGMENT OF GUILTY WILL NOT BE REVERSED for error in suppressing evidence which would have constituted no legal justification for the homicide, and the exclusion of which, therefore, could have worked no injury or injustice to the plaintiff in error.

WHERE TESTIMONY FOR DEFENDANT, IMPROPERLY REJECTED BY COURT, IS OFFERED BY STATE, AND OBJECTED TO by defendant, the error is cured, and the defendant cannot complain that he was hurt by the previous decision; the maxim of the law being *volenti non fit injuria*.

COURT COMMITS ERROR BY ALLOWING TESTIMONY TAKEN DOWN UNDER STATUTE TO BE DISCREDITED by evidence showing that the penman performed his duty in an inexperienced and bungling manner.

EX PARTE VOLUNTARY DEPOSITIONS, MADE FOR COLLATERAL PURPOSE, CANNOT BE READ AS EVIDENCE in a case, though the witnesses be dead, or absent in the public service.

ERRONEOUS INSTRUCTIONS IN HOMICIDE.—It is erroneous to charge that if two persons arm themselves on account of their quarrel, and both draw, it is quite immaterial which fired first; that there is malice aforethought in each; and that the slayer is guilty of murder. Or that if one, in violation of a state law which forbids the secret carrying of deadly weapons, arm himself with a deadly weapon, and in a fight kill his adversary, it will be murder. The law does not necessarily, and under all circumstances, attach malice to the secret carrying of deadly weapons.

INDICTMENT for murder. The court did not pass upon the evidence in the case, and a statement of it is not given. The facts concerning the points decided appear in the opinion.

*H. V. Johnson, and Bailey and De Graffenried*, for the plaintiff in error.

*W. W. Montgomery*, solicitor-general, contra.

By Court, LUMPKIN, J. We should not feel inclined to notice the minor points in this case, but having determined to award a rehearing, it becomes necessary to do so by way of direction on the next trial. As it is, we shall dispose of them very briefly.

1. It is complained that the court refused to allow the prisoner to give in evidence the whole of a conversation between himself and the witness Heath. Heath testified to threats of prisoner against the deceased, but was not allowed to prove the cause of those threats, as stated by Alford in the same conversation; all that the prisoner said at the time relating to the same subject-matter should have gone to the jury. But inasmuch as the parts suppressed would have constituted no legal justification for the homicide, however natural the resentment of Alford against Kittrell for the supposed injury done his brother, we would not for this reason have reversed the judgment.

2. So of the second ground of alleged error. Prisoner's counsel proposed to read the testimony of two of the witnesses, Brown and Heath, taken down by the court at a former attempt to try this case, for the purpose of impeaching their credit. Parts of the testimony taken down on the mistrial were read to the witnesses, and their attention particularly called to them. Such parts the court permitted counsel to read, but refused to allow them to read the balance. In this, also, we hold there was error. It being the sworn evidence of the witnesses, there was no reason, according to the rule established in the queen's case, that it should be exhibited to the witnesses in order to lay the foundation for impeaching their credit. But when the attorney-general offered to read the whole of the former evidence of these witnesses, which was in turn objected to by counsel for prisoner, the error was cured. And the defendant cannot complain that he was hurt by the previous decision. The maxim of the law being *volenti non fit injuria*.

3. Was the court right in allowing the state to introduce A. D. Jernigan, the clerk, to prove that Mr. Knight, who acted as the amenuensis of the court in taking down the testimony of Brown and Heath, given on the mistrial at a preceding term, did it in an inexpert and bungling manner? We think not. It is the duty of the court to have the testimony of each witness, after it is written, carefully read over to the witnesses, and the mistakes corrected, if there be any, so that the objects of the statute should not be defeated. When thus examined and assented to, it should speak the truth, the whole truth, and nothing but the truth. Liberty, and even life itself, may depend upon the faithful performance of this duty. To permit any particular fact, thus solemnly verified, to be subse-

quently called in question, would lead to great inconvenience. But to suffer the whole of it to be discredited, by proving the inexpertness of the court's penman, would lead to incalculable mischief. An incompetent or even slovenly writer should never be employed for this business.

4. During the progress of the trial, a proposition was made by counsel for the prisoner to read in evidence to the jury the affidavits of Phillips, Carey, and Wright, made in open court at a former term, on a motion to bail prisoner, the said Phillips having since died, and the said Carey and Wright being absent in the military service of the Confederate States in the state of Virginia; and the said affidavits being made after counsel for prisoner proposed to put the witnesses on the stand to be orally examined by the court and state's attorney, but which the court declined to do, requiring that the affidavits should be submitted in writing, which was accordingly done, the attorney-general being permitted to inspect said affidavits, the same being taken and sworn to in open court.

This testimony was rejected, and we think properly. For after all, the affidavits were *ex parte* voluntary depositions, not made as evidence in the case, but for a collateral purpose, and the witnesses not subjected to a cross-examination. That the showing would have constituted a sufficient ground for a continuance of the case, we entertain no doubt. But the defendant preferred risking a trial rather than submit to further imprisonment. After all, when we consider that the prisoner was deprived of the testimony of two of his witnesses by the public, and the third died in the service of the country, it would seem that some legislation was needed in such a case. Indeed, would it not be expedient to provide a mode for taking testimony in all state cases where it was impossible for the prisoner to procure the personal attendance of the witnesses? In all public prosecutions the witnesses for the state must be confronted with the accused. Is it consistent with the humanity of the law that parties should be compelled to elect between a protracted—not to say perpetual—imprisonment, or a trial in the absence of material testimony, especially when the witnesses are absent in the public service?

So much for the mint, anise, and cummin of this case. We now proceed to consider the weightier matters of the law involved in it.

As to the office of judge and jury in criminal trials, and the reference of the circuit judges to another tribunal, we have said all that we care to say upon these subjects.

5. In the course of his charge to the jury, the presiding judge stated, amongst other things, "that if they should find from the evidence that the prisoner and Kittrell armed themselves on account of their quarrel, and both drew, it was quite immaterial which fired first; there is malice aforethought in each, and the slayer is guilty of murder." We hold this proposition to be untenable. I hear that my adversary has threatened my life; I arm myself for defense; we meet and mutually draw our weapons; he fires first, and I kill him. Is this murder in me? I apprehend not. His honor added: "By the laws of Georgia, it is forbidden to carry deadly weapons secretly. If, in violation of this law, one arm himself with a deadly weapon, and in a fight kill his adversary, it will be murder, and especially so if the slayer be the aggressor. Malice will be implied from the unlawful act of thus arming." This we deem the fatal error in this case. For it is a fact not disputed that Alford armed himself secretly with a deadly weapon, and in the fight with Kittrell, who, the weight of testimony shows, shot first, and Alford killed him. All this is conceded. There was nothing left, then, for the jury but to write a verdict of guilty without leaving their box. They were precluded by this charge from examining the testimony, for no view which they might take of it could change the result. And it will be perceived that had Kittrell killed Alford it would have been equally murder in the opinion of the court. This, we respectfully submit, cannot be true.

Suppose the jury should find from the proof that notwithstanding the threat of Alford, the fatal interview was sought by Kittrell. At any rate, that he unnecessarily threw himself in the way of Alford, that an altercation ensuing, he drew his pistol and fired first upon his adversary, when Alford took his life. Might they not conclude that the result was produced by the excitement of the moment, and not from malice aforethought in Alford? Should the jury not have been allowed at least to examine the evidence in this and various other aspects which might have been presented of this fatal transaction? And is there any such procrustean rule of law which attaches such consequences to the secretly arming with deadly weapons, no matter for what purpose? Does the secretly carrying a deadly weapon import malice under all circumstances? We have not so understood the statute. In defiance of the law, deadly weapons are secretly worn by nine tenths of our people, for offense or defense. It may be to kill

a mad dog or a mad man, as occasion may demand. A policeman secretly arms himself for his night-watch, and in a struggle with a burglar kills him. For this, the state makes the individual indictable and punishable. But it never occurred to the framers of this act that if a citizen was slain, the law imputed malice to the homicide, no matter under what circumstances the killing took place, and would listen to no explanation. But we have said enough to make ourselves understood, and forbear to press this point any further.

We deem it improper to express any opinion upon the evidence.

A new trial is granted upon the grounds indicated.

Let the judgment be reversed.

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**ERRORS NOT PREJUDICIAL IN REJECTING EVIDENCE, ETC., ARE NOT GROUND REVERSAL:** *Avery v. Avery*, 62 Am. Dec. 513, and note 518; *Persons v. McKibben*, 61 Id. 85; *Latterett v. Cook*, 63 Id. 428, and note 434; *Heyneman v. Dannenberg*, 65 Id. 519; *Williams v. Brickell*, 75 Id. 88, and note 90; *English v. Johnson*, 76 Id. 574.

**AS TO ADMISSIBILITY OF DEPOSITIONS AS EVIDENCE:** See *Farrow v. Commonwealth Ins. Co.*, 29 Am. Dec. 564, and note 567; *Fisk v. Tank*, 78 Id. 737, and note 751.

**WILLFUL USE OF DEADLY WEAPON SHOWS MALICE:** See *Commonwealth v. Webster*, 52 Am. Dec. 711, and note 736.

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## WORTHEN v. PEARSON.

[33 GEORGIA, 235.]

**WHERE WIFE HAS ELECTED TO TAKE DOWER** out of her husband's estate, where he has devised it all, she cannot have "a home and support" also charged upon the same estate.

**TO COMPEL WIFE TO ELECT**, provisions of will must be such as to show an evident intention on the part of the testator to exclude the claim of dower; the provisions of the will, or some of them, must be absolutely inconsistent with her claim of dower.

**WIFE IS NECESSARILY PUT TO HER ELECTION**, where the whole property is conveyed by the testator, if it is clear that there is one part of the property which the testator did not intend should be subject to the claim of dower; for it would follow, in such a case, that he did not intend that any portion of it should be subject to such a claim.

**WIFE IS PUT UPON HER ELECTION** by the charge of an annuity upon land in favor of the widow, or "a support and home" for her, where it is made a charge upon land devised by the husband.

**BILL** in equity. The facts are stated in the opinion.

*W. C. McKinley*, for the plaintiffs in error.

*A. H. Stephens*, for the defendant in error.

By Court, LUMPKIN, J. Stephen Pearson died testate. His will contained the following items: "5. I decree and bequeath to my son Jeremiah one thousand acres of land, to be run in such a manner as to include my present dwelling, and also grist-mill, cotton and gin house, and bounded by the lines to be marked out." "Item 9. It is my will and desire that the balance of the property to be kept together by my executor on the real estate, lying in this county, until my son Flavius arrives at lawful age, and that my wife and family be supported out of it, and that it be worked to the best advantage, so as to improve my estate when my son Flavius arrives at lawful age, then it is my will and desire that my real estate be turned over by my executor, as herein decreed, and that the personal estate, being the residue, as well as also the rents, issues, and profits, be equally divided between my sons Jeremiah, Stephen, and Flavius, and my daughter Georgia Horne." "Item 10. After the division, as contemplated in the last foregoing item, I enjoin upon my son Jeremiah to give his mother a home and support during life, having given him, as I conceive, the most valuable share in my real estate. I make her support a charge upon the same."

Leaving out of this opinion everything irrelevant, I will state the facts according to the construction put upon them by this court.

The plaintiffs in error have recovered and been paid a support out of the estate of Stephen Pearson up to December, 1858, when Flavius Pearson became of age. By the judgment of the proper court, they have also been allowed dower in the real estate of the deceased. By agreement of parties, compensation in money was substituted, and this bill is filed to have decreed a sum of money in commutation for the "home and support" for life, allowed by the testator to his widow, and charged upon the thousand acres of land left to Jeremiah Pearson.

If the 9th item of this will stood alone, we would say, unhesitatingly, that the support given to the widow in common with the children would not bar her right to dower. It is the opinion of some that the acceptance of this provision, under this will, would constitute no bar to her claim of dower; others hold that the acceptance of this provision constrains her to conform to all its provisions, renouncing any right inconsistent with them; that no person can accept and reject the same instrument.



We pass over this point. The question now is, not whether she is entitled to dower, but having elected to take it, can she claim the value of a home and support of Jeremiah Pearson, and which is charged upon the lands decreed to him? We think not. I shall not attempt to reconcile the cases upon this subject. They are ably reviewed in the note, in 1 White & Tudor's Equity Cases, 272, 279, to *Sheatfield v. Sheatfield*, to which reference is respectfully made. Moreover, I subscribe to the principle, in all amplitude, that to compel a wife to elect that the laws and provisions of the will must be such as to show an evident intention on the part of the testator to exclude the claim of dower, the provisions of the will, or some of them, must be absolutely inconsistent with her claim of dower. But where the testator devised the whole of his property, if there be one part of the property with respect to which it is clear that the testator did not intend it should be subject to the claim of dower, it follows that he did not intend that any portion of it should be subject to dower, and in such case, the wife is necessarily put to her election: *Miall v. Brain*, 4 Madd. Ch. Rep. 68. And the charge of an annuity upon the land in favor of the widow, notwithstanding there is some contrariety of decision in England, is held to be clearly settled by the higher authority to be sufficient to put the wife upon her election: 2 Edw. 236.

Here the wife has elected to take dower out of the thousand acres of land devised to Jeremiah Pearson. It has been substantially allotted to her. Shall she now have "a home and support" charged upon the same land? We adjudge not. The court, in a former issue, looking only to the support allowed her in common with children, held that constituted no bar to dower. That judgment, right or wrong, is irreversible. But when now she seeks to subject the very lands of Jeremiah Pearson to the encumbrance of "home and support," out of which she has been endowed, we sustain the judgment of the circuit court in arresting her.

As in the view we have taken of the rights of the parties a reversal upon the other grounds in the bill of exceptions would be ancillary, we forbear to notice them.

Let the judgment be affirmed.

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DOWER, WHEN NOT BARRED BY DEVISE: *Evans v. Webb*, 1 Am. Dec. 308; *Jackson v. Churchill*, 17 Id. 514, and note 516; *Gordon v. Stephens*, 27 Id. 445.

WIDOW'S ELECTION BETWEEN DOWER AND TESTAMENTARY PROVISIONS WILL BE COMPELLED WHEN: *Beall v. Schley*, 41 Am. Dec. 415; collected cases in note to *Lewis v. Smith*, 61 Id. 715; *McQueen v. McQueen*, 62 Id. 205; *Beard v. Knott*, 63 Id. 125; *Hall v. Hall*, 64 Id. 758; note to *Church v. Bull*, 43 Id. 757. And when not: *Gordon v. Stevens*, 27 Id. 445; *Church v. Bull*, 43 Id. 754, and collected cases in note thereto 757; *Lewis v. Smith*, 61 Id. 706, and collected cases in note to same 715. As to doctrine of election, where the testator devises all of his property, see *Lewis v. Smith*, *supra*; *Church v. Bull*, 43 Id. 754. And as to election between benefits conferred by will and share in community property, see *Beard v. Knott*, 63 Id. 125; *Theall v. Theall*, 28 Id. 501, and extended note thereto 502.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ILLINOIS.**

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**ÆTNA INSURANCE COMPANY v. PHELPS.**

[27 ILLINOIS, 71.]

**DECLARATION IN ACTION ON INSURANCE POLICY NEED NOT NEGATIVE** the performance of a condition that in case of loss the company might restore the building.

**CONDITION IN INSURANCE POLICY THAT COMPANY MAY RESTORE BUILDING DESTROYED** is a condition subsequent, which, if performed, may be set up by the company in defense.

**UPON DEFAULT, WRIT OF INQUIRY ISSUES TO ASSESS DAMAGES**, which the sheriff may execute by summoning a jury from the regular panel, or from by-standers, and having the damages assessed by them either in the presence of the court or before himself.

**ACTION** by Phelps against the Ætna Insurance Company upon a fire policy. The declaration set out the policy *in hæc verba*; alleged that the premises had been destroyed by fire; and that the company had never paid the amount for which the building was insured, or any part of it. The defendant, the insurance company, demurred. The ground of the demurrer is set out in the opinion. The court rendered judgment for the plaintiff. The regular jury had all been discharged, and upon the order of the court the sheriff summoned twelve jurors, who made the assessment.

*Stuart, Edwards, and Brown*, for the plaintiff in error.

*James Roberts*, for the defendant in error.

By Court, **WALKER, J.** It is urged that the declaration in this case was insufficient, and that the court below erred in

overruling the defendant's demurrer. The policy upon which suit was brought contains this amongst other provisions: "In case of any loss on or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness; and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do within thirty days after preliminary proof shall have been received at the office of the company." It is insisted that the declaration is substantially defective, for the want of an averment negating this clause. By the common-law rules of pleading, in declaring upon a bond with a condition annexed, breaches were alone required to be assigned upon the bond. If there had been a performance of the defeasance or condition, it was held to be matter of defense. And this is certainly true of all conditions subsequent: *Hotham v. East India Co.*, 1 T. R. 645. It is, however, otherwise with conditions precedent. Gould, in his treatise on pleading, 177, states the rule thus: "It is never necessary, by the common law, for the plaintiff in his declaration to state or in any manner to take notice of any condition subsequent annexed to the right he asserts. For the office of such condition is not to create the right on which the plaintiff founds his demand, but to qualify or defeat it. The condition, therefore, if performed or complied with, is matter of defense, which it is for the defendant to plead."

In this case, the defendant in error became, according to the covenants contained in the policy, entitled to recover at the time the loss occurred. But by this condition the company had the right to defeat the recovery, by rebuilding the property destroyed. If they performed this subsequent condition, they should have pleaded the performance. This condition was inserted solely for the benefit of the company; its performance was to be subsequent to any loss which might occur, and after notice of that fact, and was purely a matter of defense: *Howard Fire and Marine Ins. Co. v. Cormick*, 24 Ill. 455.

It is also urged that the court erred in impaneling a jury to assess the damages, after the regular panel had been discharged for the term. At common law, the court had the unquestioned right to issue a *venire facias*, at any time during its session, returnable to the term, whenever the business of the court might require it. And we must suppose, if it was designed to constitute this a regular panel, that such a writ

was issued. But if that were not so, still, upon a default, a writ of inquiry may issue to have the damages assessed, which may be executed in court, or be directed to the sheriff to execute in vacation. If the sheriff executed the writ by summoning the jury, and having the damages assessed in the presence of the court, it would certainly be as regular as if done in vacation. So that whether it were executed before the court, or the sheriff, with a portion of the regular panel or by-standers, can make no difference. We are unable to perceive any error in this record requiring the judgment of the court below to be reversed, and it is therefore affirmed.

Judgment affirmed.

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THE PRINCIPAL CASE WAS CITED in *Colorado Springs Co. v. Hewitt*, 3 Col. 278, to the point that the finding on an inquisition to assess damages may be executed after the regular panel has been discharged. This case further holds that such finding is intended merely to inform the conscience of the court, and may be executed at any place in the county. At common law, upon judgment by default, a writ of inquiry was necessary, and issued to ascertain the damages of the plaintiff; but at common law, a jury summoned by writ of inquiry in case of default had no necessary connection with the regular panel; and if they served on it, or constituted it in whole or in part, it was by virtue of the writ of inquiry, and not in their character as regular jurors. In case of default, the proper practice is to swear the jury "to assess the plaintiff's damages," not "to try the issues": *Id.* 275-278.

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## GIBSON v. ROLL.

[27 ILLINOIS, 88.]

**STATUTE SHOULD BE COMPLIED WITH IN ADMINISTRATOR'S SALE.**

**HOW COURT IS INVESTED WITH JURISDICTION TO ORDER ADMINISTRATOR'S**

**SALE.** — The administrator may bring all adverse parties into court in either of two ways: 1. By serving a written or printed notice, together with a copy of the account and petition, on all the heirs or devisees in whom the title of the land proposed to be sold may be vested; 2. By publishing a notice to all parties interested to come in and show cause why the land should not be sold according to the prayer of the petition.

Either mode is equally efficacious to give the court complete jurisdiction.

**PROCEEDINGS BY ADMINISTRATOR TO SELL REAL ESTATE BIND INFANTS,** though they are not nominally made parties to the proceedings.

**PROCEEDINGS OF GUARDIAN TO SELL INFANT'S ESTATE ARE NOT ADVERSE PROCEEDINGS** as to the infant, and will, if regular, and in conformity to law, bind the infant; but if not, the infant must have opportunity to correct the errors.

**NOTICE OF ADMINISTRATOR'S SALE OF DECEDENT'S ESTATE NEED NOT CONTAIN** the names of infant claimants, though the proceeding is adverse to them. It is sufficient if the statute is followed.

**SUFFICIENCY OF NOTICE OF ADMINISTRATOR'S SALE OF DECEDENT'S ESTATE** is determined by the court.

EJECTMENT by plaintiff Gibson against Henry R. Richardson, who pleaded the general issue, and had John E. Roll substituted as defendant in his stead. It was admitted that B. F. Jewett died seised of the premises, and that defendant had a perfect chain of title from his heirs. Plaintiff offered in evidence a chain of title from the administrator of the estate, William S. Maus, and also a transcript of the record of the county court of Tazewell County, containing the proceedings in the administration of the estate of said Jewett, setting forth the petition, order, report, and approval of the sale of the premises. Defendant objected to this evidence, on the ground that there was no sufficient notice on which to base the subsequent proceedings. The objection was sustained, and defendant then introduced in evidence the notice in the proceedings mentioned, and which appears in the opinion. Verdict and judgment for the defendant.

*E. B. Herndon*, for the plaintiff in error.

*W. H. Herndon and E. L. Gross*, for the defendant in error.

By Court, CATON, C. J. The plain question is now presented, whether in proceedings by an administrator to sell the real estate of his intestate, it is necessary to make the heirs formal parties defendants in the petition, and to name them as such defendants in the notice. In *Ex parte Sturms*, 25 Ill. 390, which was a proceeding by a guardian to sell the lands of his wards, we dismissed the writ of error brought by the infants to reverse the order of sale, because the infants had not been made parties, from which it would seem to follow that they were not bound by the proceeding. If this consequence follows that decision, then we are satisfied that it was unadvisedly made, and ought not to be adhered to. This whole subject of the sale of the property of wards, by their guardians, in pursuance of laws authorizing proceedings for such sales, is examined in *Mason v. Wait*, 4 Scam. 127, and we think it is there satisfactorily shown that infants are bound, although not nominally made parties to the proceeding. Why, then, when they attain their majority, may they not bring their writ of error to reverse the order for the sale, for errors and irregularities in the proceeding? The reasoning in this last case might answer this inquiry, for it is there said that it is not a proceeding adverse to the heir, but is a proceeding by his guardian for his benefit, and should be treated as if the proceeding were by the heir himself. Now, if this is so to its

full extent, he should never afterwards be allowed to complain that in his own proceeding there is error. But the reasoning in that case upon this point should only be applied where, as in that case, the proceeding is regular, and in conformity to law, and only to that extent should the act of the guardian be considered the act of the ward; and whatever the guardian does in such a proceeding which is not in conformity to law is adverse to the infant, and he must have an opportunity of correcting that error in proper time.

These, it may be repeated, were cases of sales by guardians, ostensibly at least, for the benefit of their wards. The case before us is a sale of an administrator of the estate descended to the heirs, and not for their benefit, but to enable him to pay the debts of the ancestor. As to the heirs, it is essentially hostile in every respect, hence it is the duty of the courts to see that the law which authorizes this proceeding is complied with. This it is our duty to do; but more than this we have no right to require. Has the law required the heirs to be made parties by notice, either in the petition or in the notice? This proceeding is authorized by the one hundred and third section of the statute of wills. That requires that the administrator "shall make out a petition to the circuit court of the county in which administration shall have been granted, stating therein what real estate the testator or intestate died seised of, or so much thereof as will be necessary to pay his or her debts as aforesaid, and request the aid of the court in the premises." This is all that the statute requires shall be stated in the petition; and by what authority shall we require more to be stated? There is not a word said about the heirs. They are not requested to be mentioned or alluded to in the petition.

This petition, however, does set out the names of the widow and heirs, but it does not formally ask that they may be made parties defendants. Nor was this necessary. The portion of the statute quoted has all the elements of an *ex parte* proceeding. When a petition is filed, the court acquires jurisdiction of the subject-matter. The balance of the section shows that it was not designed that it should be necessarily *ex parte*. The section proceeds: "And it shall be the duty of such administrator or executor to give at least thirty days' notice of the time and place of presenting such petition, by serving a written or printed notice of the same, together with a copy of said account and petition, on each of the heirs, or their guardians, or the devisees of said testator or intestate, or by publishing a



notice in the nearest newspaper for three weeks successively, commencing at least six weeks before the presenting of said petition, of the intention of presenting the same to the circuit court, for the sale of the whole or so much of the real estate of the said testator or intestate as will be sufficient to pay his or her debts, and requesting all persons interested in said real estate to show cause why it should not be sold for the purposes aforesaid." Now, here is prescribed the modes by which the court may acquire jurisdiction of the persons, so to speak, of those whose interests may be affected by the proceeding. The administrator is given the alternative of one of two ways by which he may bring into court all adverse parties: one is, by serving a written or printed notice, together with a copy of the account and petition, on all of the heirs or devisees in whom the title of the land proposed to be sold may be vested; and the other is, by publishing a notice to all parties interested to come in and show cause why the land should not be sold according to the prayer of the petition. Either mode is equally efficacious to give the court complete jurisdiction, and equally satisfies the requirements of the law, although the notices are substantially different. The first requires a copy of the petition and account to be served with the notice on the heirs or devisees only; while the statute does not require these to be set out in the published notice, but that is required to be addressed to all persons interested in the subject-matter. Not only heirs and devisees, but their guardians and creditors, and in fine, everybody whose interest might be affected by a sale of the land under the petition. But it must be observed that in neither of these notices is it required that the names of the heirs or others, interested parties, shall be inserted. It leaves the door wide open for all who may conceive themselves interested, and whenever they choose, to come in, when they become in fact parties to the proceeding in name as well as in substance. It was for the legislature to say in what mode parties interested should be brought into court, and they had an undoubted right to declare that a notice by publication should be as effectual to bind the parties as a personal service. In this case, the notice was by publication, and was as follows:—

**"ADMINISTRATOR'S NOTICE.**— Notice is hereby given that I will make application to the county court of Tazewell County, on the third day of September next, for a decree to sell all or so much of the real estate of Benjamin F. Jewett, deceased,

late of Tazewell County, as will be sufficient to pay the debts of said estate. All persons interested are requested to appear and show cause, if any they have, why such decree should not be granted.

WM. S. MAUS,

"Adm'r of Benjamin F. Jewett, dec'd.

"PEKIN, July 24, 1856."

The statute has not declared what this notice shall contain, and it is for the court to determine whether its statements are sufficient. This notice gives the information that at a specified time and place the administrator would apply to the circuit court for authority to sell the whole, or so much as was necessary for the purpose stated, of the real estate of the intestate. This, we think, was sufficient for all practical purposes. This was quite as sure to put persons interested on their guard as if the property had been described by its numbers or boundaries. On the whole, we are unable to find anything even irregular in this proceeding for which we should reverse it on a direct application for that purpose, much less to hold it void in a collateral action as this is.

We strongly intimated, in *Turney v. Turney*, 24 Ill. 625, that the heirs should be made formal parties in the petition, but the decision of that question was not necessary to the determination of that case. The case had already been decided upon the ground that there had been no sufficient notice, and what was afterwards said about the form of the petition was unnecessary, and we now think unadvised. The evidence should have been admitted. The judgment is reversed, and the cause remanded.

Judgment reversed.

**INFANT WARDS NEED NOT BE MADE PARTIES** in proceedings to sell their real estate: *Smith v. Race*, post, p. 235. But on the other hand, it is held that an infant must be made a party to a proceeding to sell his land, if he is a resident: *Hunter v. Hatton*, 45 Am. Dec. 117; and that a decree will not bind him unless he has been served with process and made a party: *Id.*; *Coleman v. Coleman*, 28 Id. 86. Mere irregularities, however, in probate proceedings do not invalidate them where the court has acquired jurisdiction: *Dancy v. Stricklin*, 65 Id. 179, and note 185. The subject of judgments against infants is discussed at length in the note to *Porter v. Robinson*, 13 Id. 159.

**GUARDIAN'S OR ADMINISTRATOR'S SALE WITHOUT NOTICE, OR WITH INSUFFICIENT NOTICE, EFFECT OF:** *Mitchell v. Bowen*, 65 Am. Dec. 758, and cases referred to in note to same 760; *Palmer v. Oakley*, 47 Id. 41; *Frazier v. Steenrod*, 71 Id. 453; *Bland v. Muncaster*, 57 Id. 162; *Jackson v. Astor*, 39 Id. 281.

**THE PRINCIPAL CASE WAS CITED** in the following authorities, and to the point stated: In proceedings affecting the sale of infants' real estate, the

jurisdiction of the subject-matter is acquired by filing the petition, and jurisdiction of the persons, by publication of the notice: *Goudy v. Hall*, 36 Ill. 318. The statute must be pursued in a proceeding to sell the lands of a deceased person by his administrator, and unless the mode pointed out by the statute for bringing the parties in interest before the court has been adopted, there will be such a want of jurisdiction as will vitiate the sale: *Bree v. Bree*, 51 Id. 371; *Donlin v. Hettinger*, 57 Id. 353; *Fell v. Young*, 63 Id. 108. As to right to question jurisdiction, see *Goudy v. Hall*, 30 Id. 116. Titles of purchasers in good faith should never be overturned because of objections founded upon captions criticism; thus an objection that the administrator's notice of application for sale did not specify in what county or state the court was to be held, at which application was to be made, was held to be well founded, "as no human being who read it could have misunderstood it": *Moore v. Neil*, 39 Id. 261. It is not essential that the names of the heirs be given in the notice: *Bostwick v. Skinner*, 80 Id. 158. That heirs are not necessary parties, see also *Swearingen v. Gulick*, 67 Id. 211. An omission to name the heirs in the petition will not invalidate the decree of sale: *Hobson v. Ewan*, 62 Id. 152. Where the decree recites that, "it appearing to the court that notice according to law was given of the pendency of this cause," the recital is sufficient evidence that the proper notice has been given, and though the printer's certificate be defective, it will be presumed, from this recital, that the court received other evidence of the date of publication: *Botsford v. O'Connor*, 57 Id. 85; *Harrie v. Lester*, 80 Id. 316.

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## SEELY v. PEOPLE FOR THE USE OF A. W. NEECE.

[27 ILLINOIS, 172.]

SURETY ON OFFICE BOND WILL NOT BE LIABLE if the names put upon the bond before his own are forgeries.

L. W. LEICK was nominated master in chancery, and filed a bond, to which the names Heaton, Neece, and Morrow were subscribed. The bond was payable to the people of the state, and conditioned on the faithful performance of the duties of his office. Leick collected certain moneys belonging to the ward of A. W. Neece, which he failed to pay over. He was sued and judgment obtained. Having no property, his bondsmen were sued. Heaton testified that his name on the bond was a forgery. It was first in order, and was there before the other names were signed. The court found for the people, for the use of Neece, and defendant Seely appealed.

*James W. English*, for the plaintiff in error.

*Stuart, Edwards, and Brown*, for the defendants in error.

By Court, CATON, C. J. This action was on the office bond of a master in chancery, against one of the sureties, whose name appears to the bond. The bond is joint and several.

The facts relied upon in defense are these: In the body of the bond are three sureties named: 1. Heaton; 2. Seely, the defendant; and 3. Morrow. When presented to the defendant for his signature, the name of Heaton appeared signed to the bond as a surety; and the defendant, supposing it to have been executed in fact by Heaton, signed his name to the bond as a co-surety with Heaton. It turns out that the name of Heaton to the bond was a forgery. Although we have not been referred to, nor have we met with, a case precisely in point, yet we think upon principle this should constitute a good defense to the action on the bond. By a fraud practiced upon the defendant, by means of the commission of a high crime, he was made to assume a different and greater liability than he intended or supposed he was assuming when he executed the bond. It is not like the case where the surety, when he signs the bond, is assured and made to believe that others will afterwards sign it. In that case he acts upon the simple assurance that another will do an act which he knows may be defeated or prevented by various accidents, and he must therefore take the risk of such assurance being fulfilled. But in this case he acted upon an apparent fact, which without the commission of a great crime by others must have been true, and the commission of this crime the highest degree of caution might not suggest; and he cannot be charged with even slight neglect in not having discovered the forgery. It cannot be said that his own credulity contributed in any degree to his being bound without Heaton instead of with him. It is true that the obligee did not perpetrate or in any way contribute to the fraud, so that one of two innocent parties must suffer by reason of this forgery, but that reasonable degree of favor which the law extends to sureties should exonerate the surety who has been fraudulently induced to execute the bond, not by a false promise, which a high or even a reasonable degree of prudence should have admonished him not to rely upon, but by a forgery, which would probably have deceived the most cautious person.

The judgment must be reversed, and the cause remanded.  
Judgment reversed.

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**FORGERY AVOIDS INSTRUMENT:** *Miller v. Reed*, 67 Am. Dec. 459.

THE PRINCIPAL CASE WAS REPORTED in 2 Am. L. Reg., N. S., 344, 346, and to which a one-page note is appended. This note has been cited in *Helms v. Wayne Agricultural Co.*, 73 Ind. 331, and *Johns v. Harrison*, 20 Id. 394. But in *Stoner v. Millikin*, 85 Ill. 218, 222, where a party when asked to sign

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a note as surety refused until another person would first execute the same, and where the principal maker forged the name of such other person, and thereby induced the party to sign, and procured the money of an innocent party, who had no notice of the fraud, it was held that the fact of the forgery and the fraud would not release the surety so executing the same. It was there held that, where one of two innocent parties must be a loser by the deceit or fraud of another, the loss must fall on him who employs and puts trust and confidence in the deceiver, and not on the other; and the principal case was departed from so far as it conflicted with the rules laid down above: See p. 222. It [would seem, therefore, that unless some distinction can be drawn between the liability of a co-maker and that of a surety, the principal case is overruled by *Stoner v. Millikin*, *supra*; see *Helm v. Wayne Agricultural Co.*, 73 Ind. 830.

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## GREAT WESTERN RAILROAD COMPANY v. HELM.

[27 ILLINOIS, 193.]

**DECLARATION AGAINST RAILROAD COMPANY FOR KILLING STOCK NEED NOT NEGATIVE** the possibility that the stock may have been killed at a properly fenced farm-crossing; in which case, the company would not have been liable under the statute.

**OBJECTION TO DECLARATION IN TORT BECAUSE LAID WITH CONTINUANDO** comes too late after issue joined, and trial, and judgment rendered. If the objection is good at all, it should have been made by demurrer.

**CASE.** Guy Helm brought suit against the Great Western Railroad Company for killing certain horses, cows, sheep, and hogs belonging to him. Under the statute, the company was bound to fence its road, except at crossings and at those parts in towns, villages, etc. The declaration laid the wrong with a *continuando*, and did not declare that the stock were not killed at any of the places where the company would have been exempt from liability. Defendant pleaded the general issue. The cause was tried by the court without a jury, and judgment rendered for the plaintiff, with costs.

*Tupper and Nelson*, for the plaintiff in error.

*J. S. Post*, for the defendant in error.

By Court, CATON, C. J. The principal objection to this declaration is that it does not negative the possibility that the stock may have been killed at a farm-crossing. The statute does not exempt the company from fencing their roads at farm-crossings, nor does it exempt it from liability for killing stock at such crossings, if the road is not there fenced; but it expressly provides that it shall fence at farm-crossings, specifying the kind of fence which shall be made at such places;

that is to say, bars or gates for the accommodation of the farmers. This specification of the kind of fence does not alter the case from what it would be if the law had prescribed live hedges or stone walls in certain localities. If the stock was killed at a farm-crossing, where the company had made such a fence as the law required, which some one had left down or open without the fault of the company, whereby the stock got in and was killed, that was a matter of defense for the company, and need not be negatived.

It is hardly necessary to remark that even if any objection could ever have been urged to the declaration because the wrong is laid with a *continuando*, that should have been done by demurrer; and it is too late now, after issue was joined upon it, trial had, and judgment rendered, to assign it for error here. The declaration is good in substance, at least, and is undoubtedly sufficient to sustain the judgment.

The judgment is affirmed.

Judgment affirmed.

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THE PRINCIPAL CASE WAS CITED in *Illinois Cent. R. R. Co. v. Arnold*, 47 Ill. 174, to the point that bars are a part of a fence, and that allowing them to remain down for three months, where they form part of a "sufficient fence" which a railroad company is bound by statute to "erect and maintain," constitutes negligence on the part of the company; and it makes no difference whether the bars were taken down by the company or by the occupant of the adjacent land.

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## ARNETT v. ARNETT.

[27 ILLINOIS, 247.]

**TESTATOR IN NUNCUPATIVE WILL MUST REQUEST THOSE PRESENT, BY SIGNS OR WORDS, TO BEAR WITNESS** that such is his will, in order to render it valid under the Illinois statutes.

**BILL** to set aside an alleged will. The devisees defended, and the case was tried on a feigned issue. The facts are stated in the opinion. The court found for the complainant, and defendants moved for a new trial. The motion was overruled and excepted to.

*John Baker*, for the plaintiffs in error.

*H. K. S. O'Melveny*, for the defendant in error.

By Court, CATON, C. J. We are now called upon for the first time to say how far the literal provisions of the statute

must be complied with, in the attestation and proof of a nuncupative will. And we appreciate it as a question of very considerable importance, demanding our most cautious consideration. There is no dispute about the facts, for it is agreed by the parties that the record of the probate of the will constitutes the entire proof in the case; and the only question is, whether the facts thus stated constitute a valid nuncupative will. This is the record, and all the proof there is of the will or its attestation, except that it was shown by legal testimony to have been reduced to writing within the time required by the statute: —

“Be it known that we, the undersigned, were present on the twenty-second day of April, 1856, at the residence of Nathan Arnett, now deceased, in Clinton County, Illinois, then in his last sickness. The attending physician, Dr. A. R. Stickney, informed the said Arnett that if he had any disposition to make of his worldly affairs it would be proper to do so.

“That the said Arnett said: ‘I desire my personal property to be divided equally between my wife’s sister, Aunt Hannah, and the two girls now living in my family. I desire my real estate to be left to Nancy Jane, a girl I have raised in my family from the time she was two weeks old.’

“We declare that we were present and heard the above words spoken by the said Nathan Arnett during his last sickness, and that at the time of pronouncing the same, we believe him to be of sound mind and memory; and that the said Arnett departed this life on the twenty-third day of April, A. D. 1856.

“THOMAS E. DAVIS.

“SHERBOD WILLIAMS.”

The ninth section of our statute of wills provides: “A nuncupative will shall be good and available in law for the conveyance of personal property thereby bequeathed, if committed to writing within twenty days and proven before the court of probate, by two or more credible, disinterested witnesses, who were present at the speaking and publishing thereof, who shall declare on oath or affirmation that they were present and heard the testator pronounce the said words, and that they believed him to be of sound mind and memory; and that he or she did, at the same time, desire the persons present, or some of them, to bear witness that such was his or her will, or words to that effect.”

While we should not be inclined to require an exact conformity to the literal requirement of this statute, in the pub-



lication of a nuncupative will, yet we are not authorized or inclined to dispense with a substantial compliance with all its provisions. It is not to be denied that to allow oral testaments to be established in any case is opening a door to frauds and impositions, which have sometimes, in spite of all legislative safeguards, been practiced. Yet, from the extreme necessity of the case, they have attained a firm foothold in our jurisprudence, and they must be treated by the courts with fairness and justice, with a view to give effect to the designs of the testator, when the will is pronounced and attested in conformity to the provisions of the law. But that law must be at least substantially complied with, or it is no will. In this case, every requirement of the law was complied with, except the last member of the sentence quoted. That requires that the testator shall, at the time of pronouncing the words of the will, request some of the persons present to bear witness that such was his will, or words to that effect. It is not enough that the words of the will alone should be spoken in the presence of those who might bear witness to it, but the testator must also use some words indicating his desire or wish that those present, or some of them, should bear witness that such was his will. We will not now say that signs and gestures might not be so distinct and intelligible as to sufficiently indicate the desire of the testator that he wished those present to bear witness to the will as to amount, substantially, to words of that import, but it would have to be a very marked and unequivocal case to dispense with words actually pronounced, to the effect of those mentioned in the statute. But here we find nothing to satisfy this last clause quoted. No word was spoken, no sign made, no indication manifested, that the testator desired any one present to bear witness of his declared wishes. There is nothing to show that he ever expected or wished that any one present should remember what he had said, or should ever repeat those declarations, or should ever go before any tribunal to prove that such was his will. If we say that such must have been his desire from the nature of things, that is but conjecture at best, and the legislature has declared that such conjecture shall not be sufficient. Understanding the operations of the human mind as well as any of us, the legislature knew that most probably any one who should, when *in extremis*, declare to those about him the disposition he wished made of his property, would also desire that those present would remember and bear witness to his

wish, and to contribute what aid they might to carry out such wish. Such an inference must necessarily arise in almost every case where a will is declared by a dying man to those around him, but the law-makers thought it unsafe to rely upon such inference, however strong, and saw fit to require a direct expression of such wish by the testator at the time of pronouncing the words of the will. And yet, in the face of this express provision of the statute, we are asked to establish this will upon mere inference, for there was not one word, sign, or look expressing the wish that those present should bear witness to the will. It may be and probably is true, that he did not know it was necessary to the validity of his will that he should call upon those present to witness it; but that cannot alter the law. The statute requires that a written will shall be attested by two witnesses, yet it would shock every lawyer to decide that one witness would do, because the testator supposed that was sufficient. In most cases, our convictions would be as strong that the will expresses the true wishes of the testator when witnessed and proved by one unimpeachable witness as if witnessed by two, and yet it is not his will, because the law so declares. So here. The law required an additional formality to make this a nuncupative will, without which it should not have been admitted to probate, and for the want of which it was the duty of the circuit court to set it aside and declare it void.

Judgment affirmed.

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TWO WITNESSES TO NUNCUPATIVE WILL ARE REQUIRED, who must both be present at the making thereof, and hear the testator call both, or on two or more persons then present, to remember that such is his will: *Priscilla E. Yarnall's Will*, 26 Am. Dec. 115. For instance of good nuncupative will, where three witnesses were present and heard the bequests, and signed the will as witnesses, see *Phoebe v. Boggess*, 42 Id. 543. But a nuncupative will, executed before a notary and three witnesses, is void if one of the attesting witnesses did not understand the language in which the will was written sufficiently to comprehend what was said: *Breaux v. Gallusseau*, 74 Id. 430. A signed writing, intended as a will, but not duly attested, cannot be set up as a nuncupative will: *Stamper v. Hooks*, 68 Id. 511. The *animus testandi* at the time of the alleged nuncupation, must appear by the clearest and most indisputable testimony: *Dorsey v. Sheppard*, 37 Id. 77. The subject of nuncupative wills is discussed at length in the note to *Sykes v. Sykes*, 20 Id. 44.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: No set form of words is necessary to comply with the statute concerning nuncupative wills. Any words that express a clear intention to give the estate to a certain person will be sufficient to pass the property. Nor is it necessary that the testator should call upon persons present, by

name, to become witnesses to his will. Any form of expression, however imperfectly entered, so that it conveys to the minds of those to whom it is addressed the idea that he desires them, or some of them, to bear witness to the disposition he is making of his property, will be deemed a compliance with the statute in that regard: *Weir v. Chidester*, 63 Ill. 455. Calling upon witnesses by the testator himself, is essential to the validity of a nuncupative will: *In re Will of Hedden*, 20 N. J. Eq. 478. That the words, "listen, all of you, what I, Elizabeth Jones, do say," constitute a sufficient compliance with the statute: See same case. But a request by the alleged testatrix to one person "to witness what she said," and to another "to come back and pay attention to what she said," has been held insufficient to satisfy the statute: *Dawson's Appeal in re Last Will of Page*, 23 Wis. 90.

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## BEADLES v. BLESS.

[27 ILLINOIS, 220.]

**WAGER THAT RAILROAD WILL NOT BE COMPLETED WITHIN GIVEN TIME IS VALID** at common law, and not prohibited by the laws of Illinois as having an immoral, indecent, or illegal tendency.

**EVIDENCE THAT WAGER WAS PUBLIC TALK AND INFLUENCED SUBSCRIPTION** to railroad stock is not admissible in an action on a wager that a railroad will be completed within a certain time.

**ASSUMPSIT.** Judgment for the plaintiff. The facts are stated in the opinion.

*Judd, Boyd, and James*, for the plaintiff in error.

*S. P. Shope*, for the defendant in error.

By Court, CATON, C. J. This action was on the following agreement:—

"On the second day of June, A. D. 1856, I promise to pay to John Bless, or order, one hundred dollars, for value received, provided the Peoria and Hannibal railroad shall not be completed between Farmington and Lewistown, Fulton County, Illinois, by the first day of June, 1856, so far as the tying and laying of the rails of said road are concerned.

"LEWISTOWN, July 13, 1855.

N. BEADLES."

This, in form at least, is simply a contract for the payment of money, dependent on a future contingency; and in that aspect, is quite unexceptionable. The testimony, however, gives the transaction something of the character of a wager, and shows that a similar agreement was given by the payee to the maker of this agreement, payable upon the opposite contingency. But if viewed in the light of a wager, as we

understand the common law, the plaintiff has a right to recover upon it. It is not prohibited by our statute; it has no immoral, indecent, illegal, or pernicious tendency. Such wagers are recoverable at the common law, although the parties have no interest in the event upon which the wager depends. No doubt many excellent jurists have regretted that such idle agreements should be recognized in and enforced by the courts; yet such is the law, and it is not for us to reform it. But in this case, surely, we cannot safely affirm that these parties had no interest in the event upon which the promise to pay depended. The plaintiff may have had a legitimate and proper interest in having the road completed within the time specified in the agreement, and desired to stimulate the defendant to secure its completion, or failing in that, to indemnify himself to the extent of the one hundred dollars. Or the defendant might have had an equal interest in not having it completed in that time. The one may believe that public policy and the public good required that the whole community should exert itself to complete the road; while the other might have entertained the opinion that such a course would be detrimental to himself and the public. It is not for us to say which may have been right in their opinions. At all events, we cannot say that the wager, if it was one, was illegal or immoral; and as a simple question of law, we must hold it valid. Nor do we think the court erred in ruling out the evidence offered. What matter if people did talk about the wager, or if it influenced some to subscribe to the railroad stock, and prevented others from subscribing? We cannot say that one or the other was the wisest course, or that there was anything immoral or illegal for either or both parties to exert their influence one way or the other on the subject.

The judgment must be affirmed.

Judgment affirmed.

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WAGER THAT CERTAIN RAILROAD WILL OR WILL NOT BE COMPLETED in a certain time is not *per se* unlawful or against public policy: *Johnson v. Full*, 65 Am. Dec. 518. As to validity of wagers generally, see *Smith v. Smith*, 74 Id. 100; *Monroe v. Smelly*, 78 Id. 541, and note 548.

## GRIFFIN v. EATON.

[27 ILLINOIS, 372.]

**COURT WILL TREAT FOREIGN JUDGMENT** as would the state where it was rendered, and words of a record from a state where forms of action have been abolished will not be given the same strict technical signification which they have where those forms are retained.

**DECLARATION IN DEBT IN STATE WHERE FORMS OF ACTION ARE RETAINED** is sustained by proof of judgment on a promissory note for a gross sum of principal and interest obtained in a state where forms of action are abolished.

**ACTION** of debt by Eaton against Griffin on a judgment rendered in Missouri. The judgment introduced in evidence was as follows: "Now, at this day, comes the said plaintiff, and the defendant, although duly summoned and solemnly called, comes not, but makes default; wherefore it is considered by the court that the petition of the plaintiff be taken as confessed, and it appearing to the court that this is an action founded upon a promissory note, the court doth find that the defendant is indebted to the plaintiff in the sum of \$160, the amount of said note and interest. It is, therefore, considered by the court that the plaintiff recover of the defendant the sum aforesaid, in form aforesaid, by the court found, and his costs herein expended, and thereof have execution." To this was appended the clerk's certificate, and a commissioner's certificate that the clerk's certificate was in due form, etc. Defendant Griffin objected to the admission of the judgment, but his objection was overruled, and he excepted. Judgment was rendered for the plaintiff, and defendant sued out his writ of error.

*C. H. Constable*, for the plaintiff in error.

*M. C. McLain*, for the defendant in error.

By Court, CATON, C. J. From an inspection of this record, it is manifest that in Missouri, where the judgment was rendered, distinctions in the forms of actions have been abolished, and that technically the action was neither debt nor *assumpsit*; and in giving effect to judgments in that state, we should treat them precisely as their courts would treat them, and not apply the technical rules of the common law by which different forms of action are designated. The judgment on which this action was brought was not, in fact or in form, either debt or *assumpsit*, but in substance the judgment was in *assumpsit*, according to our designation of actions. It was for the amount

of the note and interest on which that action was brought, in a gross sum, which was the damages which the plaintiff had sustained by reason of the default of the defendant to pay as he had agreed. We are not to give to the words of the record, where the forms of actions have been abolished, the same strict and technical signification which we do here, where those forms are still retained, for the reason that they were not used in such technical sense.

We think the record was properly admitted, and the judgment must be affirmed.

Judgment affirmed.

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JUDGMENTS OF SISTER STATES, EFFECT OF: *Cook v. Thornhill*, 65 Am. Dec. 63; *Horton v. Critchfield*, Id. 701, and note 704; *Taylor v. Barron*, 64 Id. 281, and collected cases in note to same 290; *McJilton v. Love*, 54 Id. 449; *Pelton v. Platner*, 42 Id. 197; *Fletcher v. Ferrel*, 35 Id. 143, and collected cases in note thereto 155. Courts will aid execution of foreign judgment by receiving it as evidence of a debt or of property, when it is made the subject of direct action or defense in those courts, and in no other manner: *McLure v. Benoit*, 40 Id. 437.

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## HALL v. CARPEN.

[27 ILLINOIS, 386.]

WHERE THERE IS NO PRIVITY BETWEEN PARTIES, THERE CAN BE NO LIABILITY, one to the other. Thus where A and B separately have cattle sold by the same broker, and A is paid too much, and B the same amount too little, B cannot recover his deficit of A.

ACTION by Henry Carpen against Henry Hall and others. The facts are stated in the opinion. Judgment for the plaintiff.

*Morrison and Epler*, for the appellants.

*D. A. Smith*, for the appellee.

By Court, CATON, C. J. The appellants consigned to a cattle broker in New York a lot of cattle for sale, which were sold, and upon settlement the broker, by mistake, paid them \$171 too much; and about the same time, the appellee also placed in the hands of the same broker a lot of cattle for sale, and upon settlement with him, the appellee was not paid enough by the sum of \$171, and Carpen sued the Halls for this amount, on the supposition that they had got his money. This is quite a mistake. The Halls have got the broker's money, and he has got Carpen's. There was no privity between these parties in any way to connect the two transactions. They were as

distinct and separate as if they had been five years apart, and one mistake five times as large as the other; or as if one party had consigned hops, and the other corn, or even two separate brokers had been employed. But for the accidental circumstances that both parties consigned cattle to the same broker about the same time, and that in their settlements mistakes to the same amount were made, no one would have dreamed that the Halls had got Carpen's money. This money had no ear-marks to distinguish it. Who shall say that had no mistake been made, the same \$171 which was paid to the Halls would have been paid to Carpen? But even though this were capable of proof, and were actually proved, it would make no difference. There was no privity between these parties which could make one liable to the other: *Trumbull v. Campbell*, 3 Gilm. 502. The judgment must be reversed and the cause remanded.

Judgment reversed.

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THE PRINCIPAL CASE WAS CITED in *Alderson v. Ennor*, 45 Ill. 133, to the point that an action for money had and received may be maintained whenever a party has obtained money from another, which, in equity and good conscience, he ought not to retain, or has sold the property of another, and converted it into money. But the question of privity may be raised by an instruction properly framed for that purpose.

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## SMITH v. RACE.

[27 ILLINOIS, 387.]

WARDS NEED NOT BE MADE PARTIES TO PROCEEDINGS, nor is a guardian *ad litem* for them required, on an application by a guardian for an order to sell the real estate of his wards.

EJECTMENT by plaintiffs in error against defendant in error. It was admitted that John E. French entered the land in controversy, and plaintiffs showed a deed from his heirs to prove their title. Defendant showed a chain of title from the guardian of French's heirs. The controversy turned on the question whether there was a defect in the guardian's deed. Judgment for plaintiffs for only one sixth of the premises, and they appealed.

*A. B. Bunn and B. F. Smith*, for the plaintiffs in error.

*J. S. Post and Tupper and Nelson*, for the defendant in error.



By Court, WALKER, J. Was the decree under which defendant derives his title void? If so, then his title must fail, as the guardian's deed to defendant's ancestor passed no title to the premises in controversy. The only defect urged, as apparent on the face of that deed, is, that the cause was not entitled as against the heirs of French in their several names. In other words, the heirs were not made defendants to the petition of the guardian for license to sell this real estate. It contains no prayer that they be made defendants, or that process may issue against them.

Our statute does not, in this proceeding, require the minor to be made a defendant, or the appointment of a guardian *ad litem*. The tenth section of the chapter entitled "guardian and ward," provides that "the circuit court may, for just and reasonable cause, being satisfied that the guardian has faithfully applied all the personal estate, order the sale of the real estate of the ward, on application of the guardian, by petition in writing, stating the facts and having given notice to all persons concerned of the intended application," etc. Another portion of the same section provides that the order of the court may direct the sale for the support and education of the ward, or to invest the proceeds in other real estate. In this enactment there is no requirement that the wards shall be made parties to the proceeding. But the sale is authorized on the application of the guardian, by petition, after having given the notice in the mode prescribed.

Then, without making the wards either petitioners or defendants, does the court acquire jurisdiction of the person? If so, the court may, after acquiring jurisdiction of the subject-matter, determine whether the relief sought should be granted. Until jurisdiction of the proper parties, and of the subject-matter, is obtained, the court has no power to proceed in the cause, and an order so rendered would be inoperative and void. Whilst it is usual to make parties whose interests are to be affected by the litigation either plaintiffs or defendants on the record, yet no reason is perceived why the legislature may not have authority to enable parties laboring under legal disabilities to act in their own name, or in the name of others, intrusted by law with the management and control of their property. In this class of cases, the guardian is authorized, in his own name, to institute and conduct this proceeding for the benefit of the minor.

In the case of *Mason v. Wait*, 4 Scam. 127, it is held, in a

proceeding of this kind, that "it is not necessary that the ward should have a day in court. The proceeding was not adverse to her interest, nor against her. It is her own application, by her legally constituted guardian. No summons to her was necessary; nor could she have any day or guardian *ad litem* in court, unless upon suggestion, as *amicus curia*, it should appear that the guardian was about to abuse the trust, or was seeking power to injure and misapply the estate. I think it altogether an erroneous view of such cases to regard them as proceedings against the heir to divest her of her interest or property. It is an application by her, or on her behalf, for power to do acts for her benefit and interest." This decision has doubtless been regarded and acted upon by the courts and by the legal profession of the state, ever since its announcement, as the correct practice. And under that practice, large amounts of property have been purchased and sold in perfect good faith, believing that this court had definitively determined such a practice to be legal, and binding upon the estate of the minor. On the faith of that opinion, covenants for title have no doubt been entered into, under the belief, by grantors, that they were acting with perfect safety.

The stability of titles to real property requires that judicial decisions affecting them should change as seldom as possible, and then only when a necessity almost imperative demands it. Whilst it may be true that cases of great injustice may have occurred under this practice, by unfaithful guardians, in procuring license to sell the real estate of their wards, still, rather than endanger all the titles acquired since the decision of *Mason v. Wait*, 4 Scam. 127, was announced, we regard it better to leave the practice as it now stands, trusting to the circuit courts and the friends of the minor to guard and protect his interest. We therefore feel disinclined to disturb that decision.

We are aware that the views here expressed are not in accordance with those announced in the case of *In re Sturma*, 25 Ill. 390. In that case, it was improperly said that the minors were not parties to the original suit, and their interest could not be affected by the sale of their land by the guardians. In that we went too far, according to the case of *Mason v. Wait*, *supra*; but we still adhere to what was there said, when we held their remedy was by original bill or by an action of ejectment. If the decree was obtained by fraud, and the purchaser was a party to it, or chargeable with notice, the heir may impeach

the decree by original bill, or if the adjudication was had without jurisdiction of the person or property, the remedy is by a recovery in ejectment.

Then, was the decree, on the application of the guardian, regular and binding? It is insisted that it was not, because the proceeding was had in the Macon circuit court, when the heirs resided in Vermillion County. The tenth section of the act requires the application to be made in the county in which the minors shall reside, unless the ward is not a resident of the state when such application shall be made to the circuit court of the county in which the whole or a part of the estate is situated. Graham testifies that it is his "best impression that the heirs of French resided in Indiana in the years 1846 and 1847." Although this evidence is not of the most positive character, yet in the absence of rebutting evidence, we regard it as sufficient to establish the fact. It is in effect the same as if he had said it was his best recollection or memory of the matter. We therefore conclude that Indiana was the place of the residence of the minors when the application was made, and that Macon County was the proper county to institute the proceeding.

The petition, upon which that application was based, seems to have contained all the allegations necessary to give the court jurisdiction. It was accompanied by a sufficient notice, which was proved to have been given for the length of time and in the mode prescribed by the statute. The original, and further decree, were regular on their face, and fixed the time, the place, and the terms of the sale. The guardian's report of the sale was duly approved by the court, as required by the statute. The guardian's deed is in proper form, and no want of jurisdiction or error appears on the face of that proceeding. It must, therefore, be held that the title of the heirs to this real estate passed to the purchaser at the guardian's sale. And the defendants in this suit, deriving and holding their title from the grantee of the guardian, were entitled to judgment in bar of the action. This view of the case renders it unnecessary to consider the question whether the action was barred by the statute of limitations. The decree and sale under it divested the heirs of French of all title in the premises, and that is decisive of the case. The judgment of the court below is affirmed.

Judgment affirmed.

INFANT MUST BE MADE PARTY TO PROCEEDING TO SELL HIS LAND, if he is a resident: *Hunter v. Hatton*, 45 Am. Dec. 117. And it is the court's duty to appoint a guardian *ad litem* to protect the interests of an infant ward, upon the guardian's application for the sale of the ward's real estate: *Loyd v. Malone*, 74 Id. 179, and note 186; *McDaniel v. Correll*, 68 Id. 587; compare *Stuart v. Allen*, 76 Id. 551.

THE PRINCIPAL CASE WAS CITED in *Campbell v. Harmon*, 43 Ill. 21, to the point that in proceedings by a guardian to sell real estate of his wards, the latter need not be made parties; and that it is not necessary to appoint for them a guardian *ad litem*.

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## RICHARDS v. LEAMING.

[27 ILLINOIS, 481.]

**VENDOR'S LIEN IS NOT ASSIGNABLE.**

**SIMPLE ASSIGNMENT OF NOTE GIVEN FOR PURCHASE-MONEY OF LAND** does not carry with it the vendor's lien so that the assignee can enforce it in his own name.

**VENDOR'S LIEN IS WAIVED** by the taking of any security, either personal or material; or by the neglect to enforce the lien for a considerable time, though short of the time prescribed by the statute of limitations.

**SUIT** in chancery. Certain promissory notes were given in payment for certain lands sold, to which a vendor's lien attached. The notes, by simple assignment, came into the hands of Richards, and the lands, by descent, came into the hands of Jane Leaming and others. Richards brought suit against Jane Leaming and others to enforce the lien that first attached. Upon these facts, the court dismissed the bill without prejudice. Complainant appealed.

*M. McConnel*, for the plaintiff in error.

*A. G. Burr*, for the defendants in error.

By Court, CATON, C. J. The question in this case is, whether the vendor's lien for the purchase-money of land passes to the assignee of the note given for the purchase-money, by the simple assignment of the note, so that the assignee of the note can enforce it in his own name and for his own benefit.

The vendor's lien arises from principles of equity alone, and finds no foundation or support in the principles of the common law, or our statute. Courts of equity have created this lien independent of any express contract, upon the mere supposition of the intention of the parties; and whenever, from any circumstance, the court can infer that the vendor did not rely upon this lien for his security, the courts have treated it

as waived. Thus the taking of any security, either personal or material, or the neglect to enforce the lien for a considerable time, though short of the time prescribed by the statute of limitations, has been considered as a waiver of the lien: *Conover v. Warren*, 1 Gilm. 498 [41 Am. Dec. 196]; *Trustees v. Wright*, 11 Ill. 603. This species of incumbrance upon real estate has never been looked upon with favor in this state. It is a secret lien, not spread upon the records, which the policy of our law designs should exhibit the true condition of the title to all real estate; and not even resting in any contract or agreement, either in writing or parol. In the first case cited, this court said: "These equitable liens on real estate are generally unknown to the world, and frequently operate injuriously on the rights of creditors and purchasers, and ought not to be enforced, but in cases where the right is clearly and distinctly made out." And again, in the last case it is said: "These secret liens on real estate, because generally in point of fact—however it may be in legal contemplation—unknown to the parties to be affected by them, are often productive of much injustice, and ought not to be encouraged."

We ought not, therefore, to extend this lien beyond the requirements of the settled principles of equity law. In the common law it has no existence. In England, where it was first created by the court of chancery, acting upon the conscience of the vendor, as it professed, the vendor's lien has never been held assignable in any way by the vendor, although it is held to pass by devise or descent. The right of this lien is confined to the person of the vendor alone, and the apparent exceptions above stated are not in fact exceptions, for they are common attributes of nearly all personal rights, except those springing from torts. In Maryland, this question is discussed with much learning by Chancellor Bland, in *Iglehart v. Armiger*, Bland Ch. 519; and the right is held not to pass to the assignee of the note given by the vendee for the purchase-money. And in the same way was the question decided in *Briggs v. Hill*, 6 How. (Miss.) 362 [38 Am. Dec. 441]; and so by Chancellor Walworth, in *White v. Williams*, 1 Paige, 501. And the supreme court of Ohio, in *Bush v. Kinsley*, 14 Ohio, 20, held the same rule, although they held that the lien was not absolutely extinguished by the assignment of the note, where the liability of the vendor continued upon the note, by reason of the indorsement, but was in a sort of abeyance, and might be revived by the vendor, after he should have paid the

note on his liability as indorser. Kentucky alone has held a different rule, so far as our researches enable us to judge: See *Thomas v. Wyatt*, 5 B. Mon. 132. The case of *Eskridge v. McClure*, 2 Yerg. 84, is not a case in point, for there the lien was created by a written memorandum at the bottom of the note, declaring that the land should be held as security for the payment of the note. This was in fact a written mortgage, and was of course assignable, and was an incumbrance widely different from this secret, intangible, vendor's lien, which springs up without bargain and without promise, and very frequently, no doubt, without any intention or even suspicion of either party, at the time of the original transaction, but is the fruit of the will of the chancellor. We are satisfied that the law does not authorize the vendor to transfer this lien with the note taken for the purchase-money, even though he expressly professes to do so, and we are not inclined to make a law to enable him to do so.

The decree must be affirmed.

Decree affirmed.

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**VENDOR'S LIEN IS NOT AFFECTED BY TAKING PERSONAL SECURITY** in the form of a note, bond, etc., for the purchase-money: See note to *Blight v. Banks*, 17 Am. Dec. 157; *Tiernan v. Beam*, 15 Id. 557.

**ASSIGNMENT OF NOTE GIVEN TO SECURE PURCHASE-MONEY OF LAND CARRIES WITH IT VENDOR'S LIEN** on the property, unless the transfer be expressly qualified so as not to carry with it the lien: *Griffin v. Camack*, 76 Am. Dec. 344, and note 345; *Conner v. Banks*, 52 Id. 209, and note 212; and it may be enforced by the assignee: *Hanna v. Wilson*, 46 Id. 190, and note 192; *Murray v. Able*, 70 Id. 330; *Moore v. Anders*, 60 Id. 551; *Graham v. McCampbell*, 33 Id. 126. In the note to *Tiernan v. Beam*, 15 Id. 568, it is held that a vendor's lien is personal, and cannot be affected by assignment of a note for the purchase-money.

**CONTRA.—ASSIGNMENT BY VENDOR OF NOTE GIVEN FOR PURCHASE-MONEY** does not pass the vendor's lien to the assignee, and he cannot enforce it: *Wellborn v. Williams*, 52 Am. Dec. 427, and note 435; *Johnson v. Toulmin*, Id. 212; *Briggs v. Hill*, 38 Id. 441, and note 447; *Hall's Ex'rs v. Click*, 39 Id. 327, and note 330. In the case last cited, it is said that if the assignee takes the note without recourse against the assignor that he cannot enforce the lien.

**THAT ASSIGNMENT OF VENDOR'S LIEN WILL BE SUPPORTED**, see collected cases in note to *Moore v. Anders*, 60 Am. Dec. 559; *Conner v. Banks*, 52 Id. 209; *Murray v. Able*, 70 Id. 330, and note thereto 331.

**WAIVER OF VENDOR'S LIEN:** *Dibblee v. Mitchell*, 77 Am. Dec. 99, and collected cases in note thereto 101; *Mims v. Lockett*, 68 Id. 521, and note 523; collected cases in note to *Moore v. Anders*, 60 Id. 559.

**THE PRINCIPAL CASE WAS CITED** in each of the following authorities, and to the point stated: the principal case was followed in *Keith v. Horner*, 32 Ill. 526, where it was held that a vendor's lien is not assignable, even by express language; that the lien is personal, and can only be enforced by the vendor.

To the same effect are *Wing v. Goodman*, 75 Id. 161; *Markoe v. Andrus*, 67 Id. 35; *Elder v. Jones*, 85 Id. 387. The law does not authorize the assignment or transfer of a vendor's lien to the purchaser of notes given for the purchase-money: *Elder v. Jones*, Id. 387; *Dayhuff v. Dayhuff*, 81 Id. 500; and the assignee cannot enforce such a lien; *McLaurie v. Thomas*, 39 Id. 294. The taking of any security, either personal or material, or the neglect to enforce a vendor's lien for a considerable time, though short of the time prescribed by the statute of limitations, has been considered as a waiver of the lien: *Cool v. Varnum*, 37 Id. 185. As to waiver, see also *Warner v. Scott*, 63 Id. 372; *Kirkham v. Boston*, 67 Id. 604. Vendor's liens are not favored in Illinois, because of their secrecy: *Boynton v. Champlin*, 42 Id. 64; *Cool v. Varnum*, 37 Id. 185.

## STEPHENS v. BICHNELL.

[27 ILLINOIS, 444.]

**WIFE OF MORTGAGOR NEED NOT BE MADE PARTY UPON FORECLOSURE** of a mortgage given to secure payment of purchase-money.

**STRICT FORECLOSURE MAY BE DECREED, AND GENERALLY WILL BE**, where the premises are not worth the face of the mortgage, and the mortgagor is insolvent.

**ERROR THAT PROOF WAS INSUFFICIENT CANNOT BE COMPLAINED OF**, and assigned, where the bill is taken for confessed.

**DECREE MAY BE HAD AGAINST ONE OF TWO JOINT MORTGAGORS, WHERE**, after giving the mortgage, they partition the premises, agree to each pay a specified portion of the purchase-money, to secure the payment of which the mortgage was made, and one of them does pay his share, and secures a release as to his portion.

**BILL** for foreclosure. Peter Stephens and Amos Collins purchased a piece of land, and gave their joint notes and a joint mortgage on the premises to secure the payment of the purchase-money. The mortgage was executed by Collins and Stephens, and the latter's wife. Collins and Stephens partitioned the premises, and agreed that each should assume and pay off a certain portion of the mortgage. Collins paid the part agreed to be paid by him, and secured a release of the mortgage as to his part of the premises. Stephens neglected to pay, and this bill was brought by Peter Bichnell, the holder of the mortgage, to foreclose it. There was default as to all the parties, and a decree was rendered that Stephens pay the balance due, and be barred and foreclosed all equity of redemption in the premises. Writ of error by Stephens.

*C. H. Constable*, for the plaintiff in error.

*John Scholfield*, for the defendant in error.



By Court, BREESE, J. This case is submitted on the record and assignment of errors, and briefs and authorities. The principal errors are, the want of necessary parties to the bill in decreeing a strict foreclosure, and insufficiency of the evidence. The case was, a bill filed by mortgagee against the mortgagors of certain lands for a strict foreclosure, and a decree *pro confesso* rendered. The mortgage was given to secure the payment of the purchase-money of the lands, and was executed simultaneously with the deed, and the wife of one of the mortgagors was not made a party to the bill. Section 4, of chapter 34, provides, where a husband shall purchase lands during coverture, and shall mortgage such lands to secure the payment of the purchase-money thereof, his widow shall not be entitled to dower out of such lands, as against the mortgagee, or those claiming under him, although she shall not have united in such mortgage: Scates's Comp. 152. This was the rule at the common law. The seisin of the husband passing from him *eo instanti* that he acquired it, and being immediately revested in the grantor, the widow could not claim dower in the premises: *Stow v. Tift*, 15 Johns. 461 [8 Am. Dec. 266]; 4 Kent's Com. 39, and cases cited in note c. If then the widow would not be endowable, the wife, whilst the husband is living, can have no interest in the premises, and consequently she need not be a party to the bill.

The object in making the wife a party is to bar her dower: *Gilbert v. Maggard*, 1 Scam. 471. So in the case of *Leonard v. Villars*, 23 Ill. 379, this court held that the wife of a mortgagee was a necessary party to a bill to foreclose, but that was a case where the mortgage was not given to secure the purchase-money for the land mortgaged. In that case, the wife had a dower interest, as against the mortgagee, and the equity of redemption of such dower interest remained in her, and she was, therefore, a necessary party to protect that interest.

As to decreeing a strict foreclosure, that was discretionary with the court, under the circumstances. It is alleged in the bill, and confessed, that the lands mortgaged are not equal in value to the purchase-money due; it was then in the discretion of the court to decree a strict foreclosure, the effect of which is to vest the title absolutely in the mortgagee. The usual mode, in this state, of foreclosing a mortgage, is by ordering the mortgaged premises to be sold, yet the power of strict foreclosure is frequently exercised, and probably never refused, when the interests of both parties manifestly require it, as when the

mortgagor is insolvent, and the mortgaged premises are not of sufficient value to pay the debt and costs, as in this case, the bill averring both insolvency of the mortgagor and insufficiency of the mortgaged premises, and those allegations are confessed, and the bill prays a strict foreclosure. We have no statute prohibiting a strict foreclosure: *Johnson v. Donnell*, 15 Ill. 97; *Vansant v. Allmon*, 23 Id. 33.

It cannot now be urged here that the evidence on which the decree passed was insufficient, the rule being well settled that when a bill is taken for confessed, the party against whom the decree is taken cannot complain and assign for error the insufficiency of the evidence. The nineteenth section of our chancery code provides that "where a bill is taken for confessed, the court, before a final decree is made, if deemed requisite, may order the complainant to produce documents and witnesses to prove the allegations of his bill, or may examine the complainant on oath or affirmation touching the facts therein alleged; such decree shall be made in either case as the court shall consider equitable and proper."

With such a discretion vested in the court, it could not be urged that the court acted upon insufficient proof, because it would not be error to pass a decree without any proof: *Manchester v. McKee*, 4 Gilm. 517.

As to the error assigned in not taking a decree against the two Collins, it is only necessary to say, there was no necessity for a decree against them, as they and Stephens had divided the land between them, and had paid complainant for their share, and the foreclosure was brought only against Stephens's interest. The defendants Collins were so nominally only, and they do not complain of want of notice, or bring the case here. It was Stephens's interest in the land that was affected. It was quite proper to decree that Stephens should pay the balance due on the mortgage, as the Collins had paid their proportion, and had been released. We see no error in the decree, and accordingly affirm the decree.

Judgment affirmed.

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BILL, THOUGH CONFESSED, is no ground for decree, if the allegations of it are destitute of precision: *Marshall v. Tenant*, 19 Am. Dec. 126.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Under the well-recognized practice and statutory provisions of Illinois, when the defendant, by a default, confesses the truth of the allegations of the bill, no proof is required to sustain a decree based upon the allegations in the bill: *Boston v. Nichols*, 47 Ill. 358; *Benneson v. Bell*, 62

Id. 411. In Colorado, their chancery practice has been held to confer upon the court power to proceed to a decree, upon bill confessed, with or without evidence to support the bill, as the court shall in its discretion deem best: *Clear Creek C. G. & S. Mfg Co. v. Root*, 1 Col. 376. The wife of a mortgagor, where the mortgage is given for the purchase-money of land sold, is not a necessary party to a bill to foreclose the mortgage: *Short v. Raub*, 81 Ill. 509; *Burson v. Dow*, 65 Id. 148. In the case last cited, the mortgage was executed before marriage. The principal case was cited to the same point in *Fletcher v. Holmes*, 32 Ind. 520, 528.

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## GORTON v. BROWN.

[27 ILLINOIS, 489.]

**REMEDY FOR WRONGFULLY CAUSING INJUNCTION TO BE ISSUED** is by suit upon the injunction bond. Action on the case cannot be maintained.

**CASE** by J. M. Brown against J. B. Gorton. The declaration charged that Gorton falsely, maliciously, and without reasonable cause, caused a writ of injunction to be issued restraining Brown from disposing of certain lumber, and collecting certain debts, whereby he was injured. Judgment was rendered for plaintiff, and the defendant appealed.

*Blodgett and Upton*, for the appellant.

*W. S. Searles*, for the appellee.

By Court, **BREESE, J.** Preliminary to all other questions presented by this record is the question, Can this action be maintained? We have searched the precedents and books of pleadings from the earliest times to the present, and find but one case where it has been held that an action can be maintained for maliciously suing out a writ of injunction. We are well aware that elementary writers and respectable courts have held that an action on the case will lie for an abuse of the process of the courts, where special damages are alleged, and against a party for prosecuting a causeless action prompted by malice, by which the defendant has sustained some injury for which he has no other recourse or remedy. Such actions, however, for the most part, are actions wherein arrests have been made and bail demanded, or the party put to some other expense and inconvenience, which cannot be compensated in any other mode than by an action. Such actions, except where a malicious arrest is charged, are not favored by the courts, and ought not to be, for in a litigious community, every successful defendant would bring his action for a malicious

prosecution, and the dockets of the courts would be crowded with such suits. Even for instituting a criminal prosecution, and failing in it, courts regard a subsequent action for malicious prosecution with disfavor, for the reason that they have a tendency to discourage just prosecutions for crime. There is little doubt that very many aggravated cases of crime have not been prosecuted, from the dread, in the event of an acquittal, of this action to follow, and damages recovered, ruinous to the prosecutor. But the action will lie; for it is reasonable that when an injury is done to a person, either in reputation, property, credit, or in his profession or trade, he ought to have an action of some kind to repair himself. Most of the cases we have examined are cases for falsely, maliciously, and without probable cause, suing out process, regular and legal in form, to arrest and imprison another. Such arrest is tortious and unlawful, and the party causing it ought to be answerable in damages for the wrong done; but even in such case, some damage must be alleged and proved.

As we have said, we have found but one case where the action was held to be maintainable for suing out an injunction in chancery, and that was a case decided by the supreme court of Kentucky. It is the case of *Cox v. Taylor*, 10 B. Mon. 17.

The declaration in that case was adjudged insufficient, because it did not allege that the injunction or restraining order, whereby the plaintiff was prevented from the proper use and enjoyment of his land, was obtained or caused to be issued or continued without any probable cause therefor. Had this allegation been in the declaration, as it is in the one before us, it would have been sufficient. It was argued by the defendant that the remedy, by an action on the case, was merged in that on the bond which is given on obtaining an injunction. In reply to this, the court said that although a bond was given, on obtaining the injunction, that an action upon it, and on the case, are not co-extensive or commensurate, either as to the nature of the wrong, or as to the extent or criterion of damages recoverable, and therefore there was no ground for this argument, and the court likened it to a case of official bonds by sheriffs or others, both remedies would exist, and thought the same should be the case with regard to injuries occasioned by injunctions for which the party might have an action on the case, if no bond were required.

This is the only case we have been able to find going near to sustaining this action. It is a solitary case,—it stands alone,

and that fact is some evidence that it is out of the track of well-received judicial decisions. On the principle that this action is not to be encouraged, it seems surprising such a decision should have been made, especially where the injured party had a more efficient remedy, and in pursuing which, he would not be required to show a want of probable cause.

We hold the remedy on the bond given on obtaining the injunction is all the remedy to which the injured party can resort. It is designed by the statute to cover all damages the party enjoined can possibly sustain, and it is in the power of the judge or officer granting the writ to require a bond in a penalty sufficient to cover all conceivable damages. This bond is a high security which the law requires the complainant in a bill for an injunction to execute to indemnify the defendant in case the injunction shall be dissolved. It is a familiar principle, when a party has taken a higher security, his suit must be brought on that security: *Touissant v. Martinnant*, 2 T. R. 104; *Cutter v. Powell*, 6 Id. 324. The bond becomes, when forfeited, the cause of action, and is intended by the law to measure the damages of every kind which the party may sustain by wrongfully suing out the injunction in case it is dissolved. It is not at all like the official bonds of sheriffs. They are made payable to the people of the state, not to any particular person, and consequently do not merge a remedy one may have outside of the bond, and besides, it is the policy of the law to multiply the remedies against public officers. Not so with the injunction bond, that is made payable to the defendant. He is the only person interested in it. It is his security. It is all the law gives him as his security, and he is bound to sue on the bond. Were no bond given or required, then the action might lie. This action on the case, under the circumstances shown, cannot and ought not to be maintained. It is against public policy. For these reasons, the judgment is reversed.

Judgment reversed.

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THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: An action on the case will not lie for the wrongful and malicious suing out of an injunction; the remedy is restricted to the bond: *Spaide v. Barrett*, 57 Ill. 294; *Speer v. Skinner*, 35 Id. 304. But injunction bonds are to be distinguished from attachment bonds in respect to a suit for the wrongful issuance of them, etc. The condition in the attachment bond is entirely different from the one in the injunction bond; and provides for the payment of such damages as shall be awarded, "in any suit or suits

which may hereafter be brought for wrongfully suing out the attachment." This evidently contemplates suits in addition to a suit on the bond, for on that there could be but one suit: *Spaide v. Barrett*, 57 Id. 294; and to allow such an action on an attachment bond is reasonable enough, for when an injury is done to a person, either in reputation, property, credit, or in his profession or trade, he ought to have an action of some kind to repair himself: *Lawrence v. Hagerman*, 56 Id. 78.

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## BARNES v. SIMMONS.

[27 ILLINOIS, 512.]

**ENTRIES MADE BY THIRD PARTIES IN BANK-BOOKS** are hearsay merely, and are not proper evidence in an action upon a promissory note.

SUIT on a note by G. Simmons against G. C. Barnes. Plea, general issue and notice of set-off. It was in evidence that Barnes borrowed four hundred dollars of Simmons, gave his note for it, but failed to get the money. Simmons had certificates of deposit on the bank of Crane & Co. The bank clerk testified that the bank-books showed that Simmons gave up the certificates of deposit to the amount of four hundred dollars; that they were credited to Barnes, and that Barnes had drawn the money from the bank. Simmons then offered the books in evidence. Against the objection of Barnes they were admitted. Judgment for Simmons, and Barnes appealed.

*Leland and Blanchard*, for the appellant.

*Richmond and Burns*, for the appellee.

By Court, WALKER, J. This record fails to disclose any evidence necessary to authorize the admission of the books of the bank. They were not those of either party, and no necessity is perceived for their being admitted. The banker, or his clerk, who transacted the business, were doubtless competent witnesses, and must be relied upon to prove the facts contained in the books. The entries were there made without their agency, consent, or for aught that appears, without knowledge of the parties, and consequently were not binding upon them. They were not public records, nor do they fall within any class of written or documentary evidence. They are the entries of other persons not connected with the parties, and who had no right to bind them by what they did. The entries in these books are precisely like the declarations of those making them, and are hearsay evidence, and inadmissible. They are not made under the sanction of an oath, and not subject to cross-

examination. In no point of view, and for no purpose, are they admissible in this case. The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

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**BANK-BOOKS, WHEN ADMISSIBLE IN EVIDENCE:** *Merchants' Bank of Macon v. Rawls*, 50 Am. Dec. 394; *State Bank v. Johnson*, 12 Id. 645; *Union Bank v. Knapp*, 15 Id. 181, and extended note thereto 191-198, on books of account as evidence. On the subject of books of account as evidence, see also collected cases in notes to *Merchants' Bank of Macon v. Rawls*, 50 Id. 400; *Atwell v. Miller*, 61 Id. 299.

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## MARINE BANK OF CHICAGO v. CHANDLER.

[27 ILLINOIS, 525.]

**BANK AND DEPOSITOR ARE BAILEE AND BAILOR**, where funds are deposited in the bank to be held and returned in the same bills or coin.

**BANK AND DEPOSITOR ARE DEBTOR AND CREDITOR**, where funds are deposited in the bank to be used in the usual course of the banking business.

**BANK RECEIVING BANK BILLS FROM DEPOSITING CREDITOR** must account for the same at par, though they were depreciated in value both at the time received and afterwards.

**SPECIAL LOCAL CUSTOM OF BANKERS REGARDING VALUE OF BANK BILLS**, CANNOT CHANGE the values fixed by law; such change can only be made by special agreement.

**RECEIPT OF DEPRECIATED CURRENCY BY SOME BUSINESS MEN**, in payment of demands, does not prove that all creditors in the locality have agreed to receive the same.

**GENERAL AGREEMENT TO RECEIVE DEPRECIATED PAPER IN BUSINESS TRANSACTIONS** may be abandoned by common consent of the parties, and after abandonment, one abandoning party cannot hold the other to it.

**ASSUMPSIT**, for money had and received. The Marine Bank of Chicago made certain collections for Chandler, and the latter sent checks, bills, notes, etc., to the former, all of which, together with the collections, were placed to his credit. Bills on the Bank of Illinois and some other banks had been received in payment in business transactions up to May 18, 1861, under an agreement entered into by certain business houses and banks to that effect. In April they had, however, begun to depreciate considerably, and by the date above-named were twenty-five per cent below par. The parties to the agreement then refused longer to act under it, and from that time the bills had no value, except for sale to brokers. On June 21st, Chandler demanded the balance due him at the bank. The bank offered him bills of the value of those in circulation in April and May, when the money then to his



credit had been received. Chandler refused to take them, and upon the refusal of the bank to pay the full amount of the balance due in current money, brought this action. The jury found a verdict for the plaintiff, and defendant appealed.

*C. Beckwith, Fuller and McCagg, and Thomas Hoynes, for the appellant.*

*J. Gary, for the appellee.*

By Court, WALKER, J. In determining this case, it will be proper, first, to determine whether the deposits made by appellee were a bailment only for safe-keeping by the bank, or were made to be passed to appellee's credit, in the usual course of banking business. If for the former purpose, then the appellee must be responsible for any depreciation in the value of the funds which occurred before a demand was made, if appellant in good faith preserved the identical funds placed in the hands of the bank. If the relation of the bank to appellee was simply that of a bailee for safe-keeping, and the identical funds were preserved and a loss ensued by depreciation, no rule of law, principle of reason or justice can hold the bank liable for such a loss. Such a liability would be inconsistent with the undertaking, which would only require a return of the thing deposited, uninjured by the acts or neglect of the bailee. The fact that the deposit consisted of bank bills, would not distinguish it from a deposit for safe custody of articles of property in the rights, duties, and liabilities incurred by the parties.

If, on the contrary, the deposits were designed by the parties to have become a loan to or indebtedness by the bank, the relation of the parties would have been that of any other debtor and creditor. Banks in the transaction of their business may occupy either of these relations. But when the funds are deposited to be held and returned in the same bills or coin, the deposit becomes a special one, entirely different from a general one, which authorizes the bank to use the funds in the course of their business. In this case, the evidence shows that the deposits arose from collections made by the bank for the appellee. The latter at various times forwarded to the former, perhaps without an exception, bills, notes, and checks which, when collected, were placed to appellee's credit.

The funds thus received were placed in the general fund of

the bank and paid out indiscriminately in the course of the business of the bank. The evidence likewise shows that these funds when collected were current and passed as money in the payment of debts and the various other business transactions. They at that time answered all the purposes of money, and appellee was credited by them as money. From all of the evidence in the case, it appears that the parties considered and treated it as money until the 18th of May, when it became so much depreciated that it ceased to circulate as such, and was thenceforth considered and treated as a commodity bought and sold by the banks and brokers at a heavy discount. Nor was there any evidence tending to show that the bank had any directions to hold the identical funds received at the risk of appellee. Nor is there any pretense that the bank has lost a farthing on the money collected. It went into the common fund of the bank, and for aught that appears, every dollar may have been paid out at par before it ceased to circulate as money.

But as the relation of the parties to each other was that of debtor and creditor, even if no portion of the funds had been disposed of by the bank, the liability would have been the same. As well might the purchaser of a horse, of grain, or other commodity, when called on to pay, insist that the article had depreciated in value since the purchase, and that he should be relieved from paying the amount of the depreciation. No one would ever suppose that if a merchant were to purchase a quantity of grain, or other produce, and give the seller a credit at the market price, and it afterwards declined in the market, that the loss would fall upon the seller, or that he should receive the same quantity and quality of grain. The same is true of almost every character of business transactions involving a sale. To establish as a rule that in cases of that character the loss by depreciation in price, or otherwise, should fall upon the seller, and not the buyer, and give it a practical operation, would wellnigh revolutionize every description of business, and would produce incalculable injustice and wrong.

The proof of the depreciated value of the paper when received cannot change the liability of the debtor for bank bills, any more than if it had been for produce, at a higher rate than its market value. Nor can the special custom of banks in a particular locality change the laws of the land regulating the value of the currency, and fixing the standard value of the

current coins. That parties may contract to receive any commodity, in lieu of money, in payment of indebtedness, is undeniably true. This can only be done by special agreement, and not by usage. No custom can compel a creditor, in the absence of a special agreement, to receive anything but the constitutional currency of the country. The fact that the business men of the particular place have been in the habit of receiving depreciated paper money in payment of their demands, by no means proves that all creditors in that locality have agreed to receive the same, much less a person residing hundreds of miles distant. To have such an effect, a special agreement must be proved.

The doctrine of agency has no application to a case of this character. There is nothing to show that the bank was the agent of appellee, beyond the fact that it collected the money. But even if it did appear that the bank acted as the agent of appellee, it also appears that the former appropriated the funds when collected, to its own use, and made itself debtor for the amount by passing it to the credit of appellee, and by mingling the funds thus collected with those of the bank, and using them as its own. The proof shows that it was the custom of the bank to so appropriate such funds, and to pay when called for by the creditor. It would hardly be contended, if an attorney were to collect a debt for a client, in bank bills, and appropriate them to his own use, that if the bank afterwards failed, that he would be exonerated from payment. No difference is perceived in the two cases.

It is further insisted, as appellee signed the agreement to receive and pay out the bills of Illinois banks, during the continuance of the present war, that he was bound to receive such paper in discharge of this debt in June, when he made the demand of payment. The testimony shows that after the 18th of May, 1861, appellant, and all the other parties to that agreement, refused to receive such funds. From this fact it may be reasonably inferred that by mutual consent this agreement was ended, and all parties released from its further observance. When appellant and all of the parties to this agreement disregarded its stipulations, no reason is perceived why appellee should be bound by its provisions. Appellant has no right to enforce an observance of the agreement against appellee, when all other parties to it are released.

No error is perceived in giving appellee's instructions, or in

refusing those asked by appellant. The verdict is warranted by the evidence, and the judgment is affirmed.

Judgment affirmed.

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**SPECIAL DEPOSITS CREATE RELATION OF BAILEE AND BAILOR** between bank and depositor: See extended note to *In the Matter of Franklin Bank*, 19 Am. Dec. 423.

**GENERAL DEPOSITS CREATE RELATION OF DEBTOR AND CREDITOR** between bank and depositor: See extended note to *In the Matter of Franklin Bank*, 19 Am. Dec. 418; collected cases in note to *Chapman v. White*, 57 Id. 466; extended note to *Governor v. Withers*, 50 Id. 98; note to *Whitley v. Foy*, 78 Id. 238.

**GENERAL DEPOSIT IS PAYABLE, LIKE OTHER DEBTS, IN MONEY, WITHOUT DISCOUNT**, even though the deposit was made in bank bills, which subsequently became depreciated: See extended note to *In the Matter of Franklin Bank*, 19 Am. Dec. 421, where the principal case is cited.

**EVIDENCE OF CUSTOM OR USAGE IN PARTICULAR LOCALITY TO RECEIVE PAYMENT IN DEPRECIATED CURRENCY** is not admissible in an action by a depositor against the bank: See extended note to *Governor v. Withers*, 50 Am. Dec. 97-99, on customs and their validity, subdivision "banking," and which cites the principal case. Other doctrines of the principal case are therein referred to. As to what will render general and particular usages and customs good, see cases cited in note to *Steele v. McTyre's Adm'r*, 70 Id. 523. A particular custom becomes a part of the law when well understood and established. But the evidence of one individual will not establish a custom or usage of trade: *Halverson v. Cole*, 40 Id. 603. The practice of a few persons in business in which many are engaged does not establish a custom which all persons who are engaged in the same pursuit are presumed to know and recognize: *Fuhr v. Dean*, 69 Id. 484.

**CUSTOM IN OPPOSITION TO POSITIVE LAW** will not be recognized: *Cramoell v. Ship Foedick*, 77 Am. Dec. 190; *Morrison v. Bailey*, 64 Id. 632.

**THE PRINCIPAL CASE WAS CITED** in each of the following authorities, and to the point stated: Current bank bills have repeatedly been held to mean precisely the same thing as currency: *Osgood v. McConnell*, 32 Ill. 77. Where funds are not depreciated when deposited, and the bank has no right to pay in depreciated funds, the drawer of a check upon the bank has the right to insist upon its payment in current funds: *Willets v. Paine*, 43 Id. 433. Where a bank receives a sum on deposit generally, it is bound to respond to the depositor for a like sum in good funds. Evidence cannot be heard to show that it can be paid in something else. In other words, a local custom of bankers is not admissible to alter an agreement: *Marine Bank of Chicago v. Birney*, 28 Id. 92; compare *Phelps v. Town*, 14 Mich. 379. Where a certificate of deposit, by its terms, was made payable "in currency," it was held, *prima facie*, to mean money current by law, or paper equivalent in value circulating in the business community at par: *Phelps v. Town*, *supra*.

**BASS v. CHICAGO, BURLINGTON, & QUINCY R. R. Co.**

[28 ILLINOIS, 2.]

**NEGLIGENCE IS IMPLIED FROM ESCAPE OF FIRE FROM LOCOMOTIVE ENGINE**, and the burden of proof is upon the railroad company, in an action against it for such negligence, to show that the most approved mechanical contrivances were used to prevent the escape of fire.

**RAILROAD COMPANY IS GUILTY OF NEGLIGENCE**, in suffering dry grass and rubbish to be upon its right of way, or in permitting vegetation to grow thereon to such a height and density as to conceal cattle from view.

**THE** opinion states the case.

*J. I. Taylor*, for the plaintiff in error.

*Walker, Van Arman, and Dexter*, for the defendant in error.

By Court, **BREESE, J.** This was an action on the case against a railroad company for negligence. First, in negligently and carelessly suffering the fire from the engine, while running upon their road, to be communicated to the dry grass on their right of way, and from that to the adjoining stubble of the plaintiff, and through that to his wheat stacks, by which they were fired and totally consumed, twenty servants of the defendants standing by whilst the fire was raging and before it reached the stacks, and being duly notified of the fact, and requested to extinguish the fire refused to do so, or to make any effort thereto, but suffered the fire to pursue its course and destroy the wheat stacks. Second, that immediately after the fire had escaped from the engine to the dry grass and stubble, and whilst the servants of the defendant were very near to the fire, and before the fire had reached the wheat stacks, a neighbor of the plaintiff, one Belden, then and there informed those servants that the fire was communicated from the engine of the defendant, and that the plaintiff and his servants were absent from home and had no knowledge of the fire, and that the fire would burn the plaintiff's wheat stacks unless they, the said servants, extinguished it; and that from their force and proximity to the fire, they could easily have extinguished the same and saved the wheat stacks, alleging that it was their duty so to have done. That Belden, who gave the information to the defendant's servants, was unable by any personal effort of his own, or by any assistance within his reach, to extinguish the fire, requested these servants of the company to extinguish it and save the stacks; but that they, well knowing the premises, culpably and negligently permitted the fire so communicated to run its course through the stubble to the

wheat stacks, whereby the same were destroyed and totally lost to the plaintiff; that neither he, the plaintiff, nor any of his servants, were present, or had any knowledge of the fire until it had communicated with his wheat stacks. And third, that it was the duty of the defendant to keep his right of way, when the same adjoined the stubble-field of the plaintiff, free from dry grass, so that fire would not communicate from locomotives running on the road to dry grass and through that to the plaintiff's stubble; but that the defendant, well knowing the premises, omitted to do its duty in this behalf, and then and there negligently suffered the strip of land where it adjoined the stubble-field of the plaintiff to become foul with dry grass, and whilst a locomotive and train of cars in charge of the defendant's servants were being run through the plaintiff's farm on the railroad, the fire communicated from the locomotive to this dry grass, and through it to the plaintiff's stubble, and thence through the stubble to the plaintiff's wheat stacks, whereby the same were consumed and totally lost to him.

There was a demurrer to the declaration, admitting all the facts alleged in it, and the question is presented, Do they, or any of them, constitute a good cause of action? The question is an important one, not only to the railroad companies in this state, now become a great interest, but to the community at large, and it has received our most serious consideration. Several of the states have statutes upon the subject of the liability of railroad companies for fires communicated by their engines, and their courts have established rules of decision more or less stringent as their views of justice and policy dictated. Whilst our legislature have provided for the recovery of damages for a death caused by the wrongful act, neglect, or default of a railroad company, they have not provided for losses occasioned by fire, nor have any rules been established by this court upon the subject. This case is one of the first impression, and must be governed by the rules and principles of the common law, so far as they may be applicable to our condition.

The first question that arises is, Does the mere fact of fire escaping from a locomotive, by which property is destroyed, imply negligence?

At an early period in the history of railroads, it was settled by the courts of Great Britain, upon great consideration, that the fact of premises being fired by sparks emitted from a pass-

ing engine, was *prima facie* evidence of negligence on the part of the company, making it incumbent on them to show that proper precautions had been adopted by them, reasonably calculated to prevent such accidents.

There seems to us great good sense in the remarks of Tindall, C. J., in the case of *Pigot v. Eastern Counties R'y Co.*, 8 Com. B. 229. He said: "The defendants are a company intrusted by the legislature with an agent of an extremely dangerous and unruly character for their own private and particular advantage; and the law requires of them that they shall, in the exercise of the rights and powers so conferred upon them, adopt such precautions as may reasonably prevent damage to the property of third persons through or near which their railway passes. The evidence in this case was abundantly sufficient to show that the injury of which the plaintiff complains was caused by the emission of sparks, or particles of ignited coke coming from one of the defendant's engines; and there was no proof of any precaution adopted by the company to avoid such a mischance. I therefore think the jury came to a right conclusion in finding that the company were guilty of negligence, and that the injury complained of was the result of such negligence."

A rule not so stringent as this has been established by the courts of several states, based upon the principle that, as the business of railways is lawful, no presumption of negligence arises, merely from the fact of fire being communicated by their engines. The principle is, that the plaintiff must aver and prove the negligence of the defendant.

We think there is great justice in the English rule, and are inclined to adopt it as most conducive to the safety of property on our lines of railroad, extending as they do through vast prairies, filled at certain seasons of the year with dry grass of a highly inflammable nature. And we hold also, that it is negligence in a railroad company to suffer dry grass and rubbish to be upon their right of way, or permit vegetation of any kind to grow upon it to such a height and density as would conceal animals which might be upon it. It is their duty to keep their entire right of way well cleared and free from everything which might obstruct the driver's view, and prevent the discovery of animals upon it, which, by being frightened by the noise of the engine, might suddenly come upon the track and throw off the train, occasioning thereby the loss of limb or life to passengers upon it.



Negligence ought to be implied from the escape of fire, and the onus should be upon the company against which an action is brought for such negligence, to show that all the most approved mechanical contrivances were used upon the engine to prevent its escape. Locomotives, in which wood is used for fuel, are liable to emit sparks, sometimes in great volume, and they are carried, in a windy day or night, a great distance. It is incumbent, therefore, on the companies to use the greatest precautions, so as to secure the engines against emitting sparks. If they send an element abroad, in a cultivated country, so destructive and devastating in its nature as fire, they ought to be responsible for the mischief it produces. There is no hardship in this, nor in the other requirement, that they shall keep no combustible matter on their roadway, nor any vegetation whose height and thick growth might obstruct the view of the engine-driver, for in the one case mechanical ingenuity has provided safeguards, and in the other, a few hours' labor, properly directed, can keep the track and road clear.

It is no answer to say that the plaintiff should have kept his stubble-field clear of combustible matter. There was no obligation on him to do so, for it is considered good farming, and is the uniform custom of the country to suffer it to remain until the proper time arrives for turning it under by the plow; and it is also a very common custom, in this state, for farmers to stack their grain in the field in which it grew. No negligence, then, can be imputed to the plaintiff in either of these respects.

But the case is greatly aggravated on the part of the defendant, by the facts so distinctly charged, that while the fire was in progress through the stubble-field, twenty servants of the defendant were at hand who were notified the fire came from a locomotive of the defendant, and who were in a condition to arrest and extinguish it before it reached the stacks, and his servants were absent, without any knowledge of the disaster, and who were specially requested to interfere and extinguish the fire, they having the present ability to extinguish it, and which they refused to do. The plea set up by the defendant for the refusal is so absurd as to be unworthy of notice, any further than to stamp it as unworthy of civilized and Christian men. They had no right, forsooth, to enter upon the premises for such a purpose! Has it come to this, that citizens of this community are not permitted to enter the premises of another,

whose house or barn is on fire, to extinguish the flames? Is any license necessary for a purpose so benevolent? Would not savages, prompted by their own instincts, rush to the rescue of property so endangered? It is sad and humiliating to contemplate the fact that employees of a railroad company, acting under a charter granted by this state, should be so lost to all the calls of benevolence and kindness, to all the common instincts of the most ordinary humanity, as to refuse to aid in extinguishing a fire which their own employers, by their negligence, had originated, which threatened the destruction of valuable property, and which they had the power to prevent. We are shocked at the exhibition of such heartless, such criminal indifference, and can find no apology for it. The facts are admitted by the demurrer, and stand out in bold relief condemnatory of the defendant.

Railroad companies in some of the states maintain at great expense a regular, well-drilled, and efficient police along the line of their roads through cultivated places to protect the interests of property holders from injuries such as those described in this case. They feel and know, in the use of an element so destructive as fire, they ought to be bound to use the greatest precautions. What then shall be said of these men who were on the spot of the fire, who refused to extinguish it, uninfluenced by their duty to their employers or by the common feelings of regard for the interests and property of another, which they should have manifested, and through which they could have saved valuable property from total destruction? It presents a case which will not bear favorable examination, and stamps these men with disgrace and infamy, and for whose conduct the defendant ought to suffer.

We are of opinion the demurrer should have been overruled, as the declaration is good in form and substance, and makes out a *prima facie* case against the defendant.

The judgment of the court below is reversed, and the cause remanded, with liberty to the defendant to plead issuably.

CATON, C. J., and WALKER, J. We do not believe the question of the duty of railroad companies to prevent the growth of weeds upon their track is presented by this record, and decline giving any opinion upon that question.

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LIABILITY OF RAILROAD COMPANY FOR FIRES: See *Burroughs v. Hewitt*, 38 Am. Dec. 64, 70, note; *Sheldon v. Hudson River R. R. Co.*, 61 Id. 155, and note.

**RULE AS TO BURDEN OF PROOF**, where injury results from fires caused by sparks escaping from locomotive engine: See *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 64, 71, note; *Hull v. Sacramento Valley R. R. Co.*, 73 Id. 656.

**THE PRINCIPAL CASE** IS CITED to the point that in an action against a railroad company for injury to property by reason of fire escaping from its locomotives, the burden of proof is on the company to show that the engine was properly guarded against the escape of fire, in *St. Louis etc. R. R. Co. v. Montgomery*, 39 Ill. 338; *Toledo etc. R. R. Co. v. Corn*, 71 Id. 496; and is also cited and approved as to this point in the following cases: *Toledo etc. R. R. Co. v. Wand*, 48 Ind. 479; *Woodson v. Milwaukee etc. R. R. Co.*, 21 Minn. 64; *Burke v. Louisville etc. R. R. Co.*, 7 Heisk. 462; *Spaulding v. Chicago etc. R. R. Co.*, 30 Wis. 121; but is cited and disapproved on this point in the cases following: *Smith v. Hannibal etc. R. R. Co.*, 37 Mo. 296; *U. P. R. W. Co. v. Rolles*, 5 Kan. 187; *Gaudy v. Chicago etc. R. R. Co.*, 30 Iowa, 422. So it was held not to be negligence *per se* for a railroad company to suffer grass and weeds to accumulate on its right of way, in *Illinois etc. R. R. Co. v. Mills*, 42 Ill. 413; and in *Ohio etc. R. R. Co. v. Shanefelt*, 47 Id. 497. But Breese, J., in a separate opinion in the former case, and in a dissenting opinion in the latter, cites the principal case, and adheres to the views therein expressed; claiming that railroad companies should keep their roadway free from inflammable material, and that it is negligence *per se* to permit it to remain. The rule thus laid down in the principal case is however repudiated, in *Illinois Central R. R. Co. v. Frazier*, Id. 505, 506, holding that a railroad company is bound to no higher duty to keep its right of way free from grass or weeds than are the adjoining land-owners, to keep the adjoining lands so free. The question of comparative negligence, in such case, is held to be a question of fact properly left to the jury: Id.; *Illinois Central R. R. Co. v. Nunn*, 51 Id. 78; *Chicago etc. R. R. Co. v. Simonson*, 54 Id. 504; *Illinois Central R. R. Co. v. Frazier*, 64 Id. 28; see also *Kellogg v. Chicago etc. R. R. Co.*, 26 Wis. 229, citing the principal case. But the principal case is cited to the point that where the engine of defendant's gravel-train, on which were a large number of its workmen, set fire to combustibles on the track, which was known to defendant's servants in charge of the train, and the fire spread to plaintiff's property, failure to stop the train and leave men to extinguish the flames, was negligence, rendering the company liable, in *Rolke v. Chicago etc. R. R. Co.*, Id. 540.

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## HARRIS v. MILLS.

[28 ILLINOIS, 44.]

**IN ALLOWING DEFENSE OF STATUTE OF LIMITATIONS**, courts of equity generally follow the law. A bar of the statute, at law, forms a bar in equity.

**ACKNOWLEDGMENT SUFFICIENT TO REMOVE BAR OF STATUTE OF LIMITATIONS**, at law, will be sufficient in equity.

**DEBT IS PRINCIPAL THING**, and the mortgage given to secure it is the incident. The latter follows the former.

**WHEN STATUTE OF LIMITATIONS BARS RECOVERY ON NOTE**, the right to foreclose a mortgage given to secure the note is also barred; unless the mortgage contains a covenant for the payment of the money, when it might be that it would require the period fixed for the limitation in such cases to bar the right to foreclose.

THE facts are stated in the opinion. See S. C. before, 25 Ill. 165.

*W. H. Homes and J. M. Scott*, for the appellant.

*H. M. Wead and E. M. Powell*, for the appellees.

By Court, WALKER, J. This bill was exhibited to foreclose a mortgage given to secure a note alleged to have been lost. The mortgage bears date the 12th of May, 1837, and recites a note for seven hundred dollars. The note is alleged to have been given on the 9th of April, 1836, by Edwin Mills, to appellant, due on the ninth day of September, 1838. The mortgage was not recorded until the eighth day of November, 1855, and appears never to have been acknowledged. It also appears that Edwin Mills, on the thirteenth day of January, 1839, executed a mortgage on the same land, to secure two thousand dollars, to Harlow Mills, for indebtedness due to him. This latter mortgage was acknowledged and recorded. Edwin Mills, on the seventeenth day of February, 1842, conveyed the mortgaged premises to Harlow Mills, for the expressed consideration of two thousand dollars. This deed was recorded on the 4th of August, 1842, in the proper office.

The bill charges that this deed and mortgage from Edwin to Harlow Mills are without consideration, and are fraudulent and void. It is also charged that they were taken by Harlow, with full notice of appellant's prior mortgage. The answer alleges that a consideration was given, and denies all notice of the prior mortgage. The answer also sets up and relies upon the lapse of more than sixteen years after the maturity of the note and before the exhibition of the bill, as a bar to a foreclosure. On the hearing, the court below dismissed the bill and rendered a decree against complainant for costs, to reverse which he prosecutes this appeal.

The principal question presented by this record is this: The statute of limitations having barred a recovery by suit on the note, does it form a bar to a foreclosure of the mortgage by bill in equity? Had this been an action on the note, over sixteen years having elapsed after the maturity of the note, the recovery would have been barred. If such an action had been instituted, and a recovery defeated, the judgment could have been interposed as a successful bar to a foreclosure. Or had an ejectment been brought, and the bar of the statute allowed, to defeat a recovery against Harlow Mills or those holding under him, the judgment might also have been relied upon to prevent

a decree of foreclosure. Or, had a *scire facias* been sued, and had the statute of limitations been successfully interposed to defeat a recovery, the judgment might have been pleaded to avoid a foreclosure by bill. When the party has elected one of several remedies, and it results in a judgment against the mortgagee, that judgment becomes as complete a bar to a proceeding in a different form for a foreclosure, as payment, release, or other discharge.

The question however still recurs, whether, after several remedies have been barred but not established in a legal proceeding, the bar may be relied upon in other and different remedies? As a general rule, courts of equity follow the law in allowing the defense of the statute of limitations. A bar of the statute at law forms a bar in equity: Story's Eq. Pl., secs. 500, 751. In equity, as at law, an acknowledgment that a debt is due, and a promise to pay it, will take it out of the operation of the statute. If the mortgagor is permitted to remain in possession twenty years after a breach of the condition, the right to file a bill to foreclose will be generally considered as barred and extinguished. Though in cases of this description, as the law is not positive, but is based upon presumption of payment, it is open to be rebutted by circumstances: 2 Story's Eq., sec. 1028 b. This court has repeatedly held, in conformity to the general doctrine announced by the adjudged cases, that the debt is the principal thing, and the mortgage is the incident. That the latter follows the consideration of the former. That an assignment of the note operates *ipso facto* to transfer the mortgage. That a payment, release, or other discharge of a note satisfies and releases the mortgage. If we are to be controlled by analogy, no reason can be perceived why a bar to a recovery on the note should not produce the same effect on the mortgage.

In Great Britain, it is usual to insert in the mortgage itself a covenant for the payment of the money. When such a covenant is found in the mortgage, it being under seal, and the debt, to secure which it was given is not, a bar to a recovery of the debt, if of a shorter period than a bar to a sealed instrument, could not affect the remedy on the covenant in the mortgage. If the statutory period necessary to bar an unsealed instrument be of shorter duration than a sealed instrument, a mortgage containing such a covenant given to secure the payment of a debt, evidenced by an unsealed note, would be governed by the longer period required to bar a

recovery on sealed instruments. The mortgage, in this case, contains no such covenant. This being so, renders the decisions of the British courts on mortgages containing such covenants, and given to secure simple contracts, inapplicable to this case. The statute having barred a recovery on the note, according to the theory upon which the statute is based the presumption is that the debt has been paid. There is no evidence in this record showing any promise, to take it out of the operation of the statute.

These statutes are, emphatically, statutes of repose. Without their aid litigation would never be barred, and titles and possession of property would never be quieted. By the efflux of time, the loss of evidence, the death of witnesses, and the failure of memory, were it not for the bar of these statutes, great injustice would result. These considerations have induced all civilized nations to adopt such laws, differing in detail, and in the period necessary to operate as a bar, but all based upon the same principles, and to attain the same object. Nor need such enactments work injustice. Persons under disability have allowed to them ample opportunity, after the disability ceases to exist, for the assertion of their rights, and those not under disability have also ample opportunity, within the period of limitation, to assert theirs. To avoid loss, the creditor has only to use reasonable diligence to avoid the bar of the statute.

It has been said that no length of time will bar a foreclosure by a mortgagee out of possession. This is placed upon the ground that the relation of landlord and tenant is supposed to exist between the parties. But such is not the true relation of the parties. For some purposes, and to a limited extent only, a portion of the incidents are the same. To a limited extent, and for some purposes, the relation of vendor and vendee, and trustee and *cestui que trust*, also exists. The relation which the parties bear to each other is peculiar to itself, partaking in some degree of the incidents of these other relations, but analogous in all particulars to no one of them. Whilst a tenant, until he surrenders the possession to the landlord, cannot rely upon the statute, yet the mortgagor, by acquiring an outstanding title, and occupying the premises under it for the period, and upon the conditions imposed by the statute, may invoke its aid to prevent a foreclosure. Nor is he, like a tenant, required to account for rents and profits, bound to repair, nor is he impeachable for waste. Other courts have held, and

such is clearly the weight of authority, that when the statutory period necessary to bar a recovery at law has elapsed, it will bar a foreclosure: *Christophers v. Sparke*, 2 Jacob & W. 234; *Jackson v. Wood*, 12 Johns. 242; *Giles v. Baremore*, 5 Johns. Ch. 545; *Waterman v. Haskins*, 7 Johns. 283; *Jackson v. Myers*, 8 Id. 383 [3 Am. Dec. 504]; *Baker v. Evans*, 2 Car. L. Rep. 614; *Hughes v. Edwards*, 9 Wheat. 497; *Moore v. Cable*, 1 Johns. Ch. 385. We are, therefore, for these reasons, of the opinion that when the note became barred by the statute, the right to foreclose also became barred, unless the mortgage had contained a covenant for the payment of the money, when it might be that it would require twenty years to produce that effect, as an ejectment would not be barred under the general limitation law before that period, unless it be under the seven-year limitation acts. No error is perceived in dismissing complainant's bill, and the decree of the court below must be affirmed.

Decree affirmed.

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EQUITY APPLIES STATUTE OF LIMITATIONS AS IT WOULD BE APPLIED AT LAW, in all cases of concurrent jurisdiction at law and in equity: *Dugan v. Ottings*, 43 Am. Dec. 306; *Johnson v. Toubmin*, 52 Id. 212; *Hamilton v. Hamilton*, 55 Id. 585; *De Cordova v. Smith*, 58 Id. 136; *Lexington Life etc. Ins. Co. v. Page*, 66 Id. 165, 183, note.

COURTS OF EQUITY ACT IN OBEDIENCE AND ANALOGY TO STATUTE OF LIMITATIONS, and refuse relief wherever the claim would have been barred by such statute, if it had been made in a court of law: *Smith v. Fly*, 76 Am. Dec. 109; *De Cordova v. Smith*, 58 Id. 136; *Tarleton v. Goldthwaite's Heirs*, 58 Id. 296.

THAT RIGHT OF MORTGAGEE TO FORECLOSE MORTGAGE is not barred by the same lapse of time that would bar an action on the debt secured by it, see *Newitt v. Bacon*, 66 Am. Dec. 609, and note; *Wilkinson v. Flowers*, 75 Id. 78.

THE PRINCIPAL CASE IS CITED to the point that where the debt, for the security of which a mortgage was given, is barred by the statute of limitations, the right to foreclose the mortgage is also barred, in the following cases: *Pollock v. Moson*, 41 Ill. 521; *Gibson v. Rees*, 50 Id. 405; *Medley v. Elliott*, 62 Id. 534; *Hagan v. Parsons*, 67 Id. 171; *Locke v. Caldwell*, 91 Id. 419.

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## OTTAWA GAS LIGHT AND COKE CO. v. GRAHAM.

[28 ILLINOIS, 78.]

IN ASCERTAINING MEASURE OF DAMAGES IN ACTION ON CASE for injury to property, all the circumstances connected with the injury are proper to be considered by the jury.

MODE OF ASCERTAINING DAMAGES in an action on the case for injury to plaintiff's well, and for pollution of the water thereof, pointed out.



**JURORS SHOULD TEST TRUTH AND WEIGHT OF EVIDENCE, WHEN HEARD,** by their general knowledge derived from experience, observation, and reflection; and an instruction to them to apply special circumstances and facts connected with the case in forming their verdict is erroneous.

**JUROR HAVING KNOWLEDGE OF FACTS NOT IN EVIDENCE** has no right to consider them in making up a verdict. Before he can do so, he should be sworn and testify to the facts, precisely as any other witness.

**ACTION** on the case for injury to the water of plaintiff's well, occasioned by the flow of impurities from defendant's gas-works. The jury found in favor of plaintiff, and defendant excepted to denial of motion for a new trial. The opinion sufficiently sets forth the case.

*Rice and Lewis, and E. Van Buren, for the appellant.*

*Leland and Blanchard, and Gray, Avery, and Bushnell, for the appellee.*

By Court, **WALKER, J.** On the trial below, appellant offered to prove how much it would cost to obtain a supply of good water, by purchasing a right from the water company; or by the construction of a cistern. The court refused to permit the introduction of this evidence, and that decision is assigned as one of the errors on this record. If the erection of the gas-works produced injury to appellee's well, and polluted the water, he has the undoubted right to recover a sum sufficient to cover any loss he has thereby sustained. The company has the right to so use their franchise as to produce no injury to the rights of others. When they obtained their charter, there was an implied duty imposed that they should not in its exercise deprive, or even incommode, others in the exercise of their rights, without becoming liable to respond in damages. In ascertaining the true measure of such damages, all the circumstances connected with the injury are proper to be considered by the jury.

In this case, it may be a fair measure of damages to ascertain the cost of furnishing a sufficient quantity of water equally pure with that which supplied the plaintiff below from his well before its injury by the gas-works. When that cost is ascertained, and the cost of keeping the conductors and other machinery in repair, the allowance of such a sum as would produce an annual interest sufficient to furnish the water from the company, and make the repairs, would be a fair measure of damages. But if the supply, when thus obtained, was inferior in salubrity or taste, that should also be taken into account.

So, if there was danger that it would not be permanent. Property furnished with an inadequate supply, or with an abundance of water of inferior quality, would be of less value than if supplied with an abundance of water of good quality. If a resort to a cistern is the only means of replacing the proper supply of water, then its quality should be taken into consideration, and if inferior in quality, that fact should have its due weight. In this view of the case, we are of the opinion that this evidence was improperly rejected.

Another means of arriving at the damages would be to ascertain the depreciation of the value of the property by reason of the erection of the gas-works; to ascertain how much less the property would sell for in consequence of the erection than if it had not been made. And in ascertaining that fact, all the circumstances which might show a depreciation in value should be considered. If the property would sell for the same amount, independent of a rise in similar property, then there would be no loss; but if it would not, then the difference would be the damages sustained.

It is also insisted that the court erred in the qualification annexed to appellee's first instruction. By it the jury were informed that in making an estimate of the damages, they might exercise their judgment upon the facts in proof by connecting them with their own knowledge and experience. If this was designed to refer to their general knowledge as intelligent business men, it was correct. Jurors, when the evidence is heard, must test its truth, its weight, and what it all proves, by their knowledge and judgment, derived from experience, observation, and reflection. They are not bound to regard evidence precisely as given, but must consider its truth and weight by their knowledge of men, the business affairs of life, together with the motives which influence men. These are all legitimate and necessary means of arriving at the truth, and if the jury so understood the instruction, it was proper.

If, however, the jury understood it to apply to special circumstances and facts connected with the case, it would be calculated to mislead. In forming their verdict, the jury must be governed by the evidence admitted in the case. If a juror has knowledge of facts not in evidence, they have no right to consider them in making up a verdict. Before they can take these into consideration, the juror should be sworn and testify to the facts precisely as any other witness. The party against whom it may operate has the right to cross-examine the wit-

ness, and must have an opportunity of meeting it with rebutting evidence. This instruction was liable to be understood by the jury as authorizing them to act upon facts not in evidence but within their knowledge. It should have been modified so as to exclude such a right, and so as to limit their action to their general knowledge and experience, and this is the extent to which the case of *City of Chicago v. Major*, 18 Ill. 349 [68 Am. Dec. 553], proceeds.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

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DAMAGES ARE COMPENSATION FOR ACTUAL INJURY in actions *ex delicto*, and must be the natural and proximate consequences of the act complained of: *Worcester v. Great Falls Mfg. Co.*, 66 Am. Dec. 217, 219, note.

DELIBERATIONS OF JURY: See *State v. Croteau*, 54 Am. Dec. 90; *Shelton v. Hamilton*, 57 Id. 149; *Kisten v. Hildebrand*, 48 Id. 416; *Phillips v. Runnels*, 43 Id. 109.

APPLICATION OF JUROR'S KNOWLEDGE IN FORMING VERDICT. — It was the ancient doctrine that a juror's private knowledge of facts had as much right to sway the judgment in forming a verdict as the evidence delivered in court. And therefore, although no proofs were produced on either side, the jury might bring in a verdict: 3 Bla. Com. 374. But with the more modern notion as to the proper qualifications of a juror, and especially that he be impartial and unbiased, it has become well settled, as held in the principal case, that a juror has no right to consider his private knowledge of facts not in evidence in making up a verdict: *Regina v. Rosser*, 7 Car. & P. 648; *Manley v. Shaw*, Car. & M. 361; *Schmidt v. New York etc. Ins. Co.*, 1 Gray, 529. It is not now contemplated, as anciently, that jurors shall know the parties and the case beforehand, so as to try cases on their personal knowledge. On the contrary, they are to try causes on evidence produced before them. They must, in general, act upon knowledge derived from the testimony of those who have had the means of acquiring actual knowledge of the fact from actual perception of the same by the senses: *Ingram v. Plasket*, 3 Blackf. 450, 452; since it rarely occurs that a jury can decide on a matter of fact by means of their own actual observation: Id.; Stark. Ev. 16. Moreover, jurors should know so little of the case as not to have formed or expressed any opinion in regard to its merits, and should be free from bias and prejudice: *Commonwealth v. Dorsey*, 103 Mass. 412. And if a juror knows any particular fact material to the proper decision of the case, he ought to be sworn as a witness in open court: 3 Bla. Com. 375; *McKain v. Love*, 2 Hill (S. C.), 506; *State v. Powell*, 7 N. J. L. 244; *Dunbar v. Parks*, 2 Tyler, 217; *Howser v. Commonwealth*, 51 Pa. St. 332; *Parks v. Boston*, 15 Pick. 198; *Matter of Foster's Will*, 34 Mich. 21; and he should be publicly examined, so that his evidence, like that of any other witness, may first be scrutinized as to its competency and bearing upon the issue, and for the further reason that the court and the parties may know upon what evidence the verdict was rendered: *Regina v. Rosser*, 7 Car. & P. 648; Stark. Ev. 816; *Patterson v. Boston*, 20 Pick. 159, 166; *Schmidt v. New York etc. Ins. Co.*, 1 Gray, 529; and see *Gass v. Stinson*, 3 Ham. 98. A fact not judicially cognizable may be known to the members

of the court, or to the jurors individually, but such knowledge will not dispense with the necessity of proof upon the record: *Lenahan v. People*, 3 Hun, 164; S. C., 5 Thomp. & C. 265; *Wheeler v. Webster*, 1 E. D. Smith, 1; *Wilkie v. Bolster*, 3 Id. 327.

But while jurors must, in forming their verdict, be governed by the evidence admitted in the case, they are not bound to regard such evidence precisely as given. They must, in some degree, act on their own knowledge of the parties and their witnesses: *McKain v. Love*, 2 Hill (S. C.), 506. There is said to be "no test of the truth of human testimony, except its conformity to our knowledge, observation, and experience": *Daggers v. Van Dyck*, 37 N. J. Eq. 130, 132. And it is held that a juror may apply his own general knowledge and experience to the examination of the particular case, in estimating the weight of the evidence, and in assessing the damages: *Parks v. Boston*, 15 Pick. 209; *Patterson v. Boston*, 20 Id. 166; *Murdock v. Sumner*, 22 Id. 156; to this extent, at least, he may properly call to his aid his personal knowledge, learning, and experience: Id.; *Schmidt v. New York etc. Ins. Co.*, 1 Gray, 529; *Bee Printing Co. v. Hitchborn*, 4 Allen, 63, 65. And where the credibility of one of the plaintiff's witnesses was the subject of inquiry in the jury-room, and a juror stated a rumor he had heard derogatory to the character of the witness, the court refused to grant a new trial on that account, although it may have influenced the opinion of some of the jury: *McKain v. Love*, 2 Hill (S. C.), 506. But see *Schmidt v. New York etc. Ins. Co.*, 1 Gray, 529; also *Matter of Foster's Will*, 34 Mich. 21, 25, where it is said that "if a verdict were formed on statements of ordinary facts by one juror to his fellows, it would be a violation of their oaths." And see *Doustan v. State*, 6 Humph. 276. Every suitor who comes into court is entitled to have his case tried upon evidence submitted in open court, and not upon the *ex parte* statements of a juror made where contradiction and explanation are alike impossible: *Simpson v. Kent*, 9 Phila. 30.

THE PRINCIPAL CASE IS CITED to the point that in estimating the damages for an injury to real estate, resulting from a nuisance, it is proper to consider the depreciation in the value of the plaintiff's property occasioned thereby, in *Illinois etc. R. R. Co. v. Grabbill*, 50 Ill. 246; *Chicago etc. R. R. Co. v. Stein*, 75 Id. 41; *Chicago etc. R. R. Co. v. Maher*, 91 Id. 316.

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## ROBERTSON v. DODGE.

[28 ILLINOIS, 161.]

JURY CANNOT LAWFULLY, FROM MERE CAPRICE, DISREGARD TESTIMONY OF UNIMPEACHED WITNESS, although they are the judges of the credibility of witnesses. They must exercise their judgment, and not their will, when passing upon the credibility of a witness.

ACTION to recover claim arising out of an alleged contract to build a partition fence between the farms of the parties. Verdict and judgment for plaintiff, and defendant assigned for error the refusal of the court to grant a new trial. The opinion sufficiently states the case.

*Philo E. Reed and W. C. Goudy*, for the appellant.

*J. K. Ripley and A. G. Kirkpatrick*, for the appellees.

By Court, CATON, C. J. Under the evidence and the instructions in this case, this is a most extraordinary verdict. If the witness Robertson is to be believed, then the plaintiff did sell this claim against the defendant to the witness when he sold the farm, and it was a part of the same transaction. This transferred to the witness the equitable title to the claim, and the right to enforce or release it as he pleased. He refused to purchase the farm till this difficulty was disposed of. It was disposed of when it was sold to him, thereby enabling him to release or settle it as he pleased. He released it, and this, as he supposed, secured peace and quiet in his neighborhood. Such release, although voluntary, was a good defense to any action for this demand, at least unless it was prosecuted by Robertson. The only question would seem to be, Was the jury justified in disregarding the testimony of this witness? He was not impeached in the least in any way, so far as this record shows. Indeed, there is no intimation that he is not a truthful man. Can a jury, from mere caprice, entirely disregard the testimony of a witness unimpeached in any way? This they cannot lawfully do, although they are the judges of the credibility of witnesses. They must judge of that fact, as of any other in the case, from evidence. They cannot disregard the testimony of a witness without some cause. They must have some grounds for disbelieving him before they are authorized to do so. They must exercise their judgment, and not their will, when passing upon the credibility of a witness.

The judgment is reversed, and the cause remanded.

Judgment reversed.

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DISREGARD BY JURY OF UNCONTRADICTIONED AND UNIMPEACHED WITNESS.— It is the province of the jury to decide on the credibility of witnesses: *Taylor v. Kelly*, 68 Am. Dec. 150; *Jones v. State*, 62 Id. 550; *Wing Chang v. Los Angeles*, 47 Cal. 531; *Walker v. State*, 72 Ga. 200; *Schimmelfenig v. Donovan*, 13 Ill. App. 47, 51; *Mechelke v. Bramer*, 59 Wis. 57; *People v. Wallin*, 55 Mich. 497; *Finerty v. Fritz*, 6 Col. 137; *Nelson v. Vorce*, 55 Ind. 455. Indeed, the credibility of witnesses is entirely a question for the jury, under proper instructions from the court, and must be taken into their consideration: *Childs v. State*, 76 Ala. 93; *Rider v. People*, 110 Ill. 11; *Frierson v. Galbraith*, 12 Lea, 131; *Wait v. McNeil*, 7 Mass. 261. But they must bring to its consideration a candid and dispassionate judgment, and are not at liberty to reject the testimony of any witness from mere caprice, nor upon any other ground which is not sufficient to satisfy a fair and candid mind when viewing the subject in the light of all the facts disclosed by the evidence, that the

testimony of such witness is not entitled to belief: *Edler v. Uchtmann*, 10 Ill. App. 488. They must exercise their judgment in regard to the credit which should be given a witness, and not their will merely: *Hartford Life Ins. Co. v. Gray*, 80 Ill. 28, 32; *Chicago etc. R. R. Co. v. Stumpe*, 55 Id. 367, 375; *Chicago etc. R. R. Co. v. Gretner*, 46 Id. 74, 80, all of which cite the principal case to this point. It is their duty to take into consideration all the evidence, whether circumstantial or otherwise, tending to disprove any statement of fact made by a witness in the course of his testimony, and thus determine the weight or credibility to be given to such statement: *Rider v. People*, 110 Id. 14; and see *Hirschman v. People*, 101 Id. 568; *Watson v. Watson*, 58 Mich. 507; *Howard v. State*, 73 Ga. 83.

But the general rule undoubtedly is, that the positive testimony of a disinterested, unimpeached, uncontradicted witness, cannot be arbitrarily or capriciously disregarded by the jury: *Newton v. Pope*, 1 Cow. 110; *Lomer v. Meeker*, 25 N. Y. 361; *New York etc. Ferry Co. v. Moore*, 6 Northeastern Rep. 293; reversing S. C., 32 Hun, 29. In other words, when a fact is sworn to by a witness of fair fame, and who is uncontradicted by other testimony, his testimony cannot in general be disregarded by either court or jury: *Conrad v. Williams*, 6 Hill, 444; *Mich. Carbon Works v. Schad*, 38 Hun, 71, 76; *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549; *Harding v. Brooks*, 5 Pick. 244; *Eugmann v. Estate of Immel*, 59 Wis. 249. But this rule is subject to qualification, as where there is some intrinsic improbability in the statements of the witness, and he has shown himself unworthy of credit by his attempt to falsify a collateral transaction involved in the suit, in which case the jury may reject his testimony as incredible, although he is not impeached or contradicted by direct evidence: *Tracey v. Town of Phelps*, 22 Fed. Rep. 634 (Cir. Ct. N. Y.). So, as a general proposition, a witness may be contradicted by circumstances as well as by the statements of others, contrary to his own, and a jury is not bound to adopt his statements simply because no other witness has denied them, and he is not impeached: *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549; *Kavanagh v. Wilson*, 70 Id. 177; *Gildersleeve v. Landon*, 73 Id. 609; *Kochler v. Adler*, 78 Id. 287; *New York etc. Ferry Co. v. Moore*, 6 Northeastern Rep. 293; reversing S. C., 32 Hun, 29; *Watson v. Watson*, 58 Mich. 507. A witness, though unimpeached, may have such an interest in the question at issue as to affect his credibility: Id.; *Andrews v. Hyde*, 3 Cliff, 516; *Mich. Carbon Works v. Schad*, 38 Hun, 71; *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549; as where the testimony proceeds from a person who would be guilty of a criminal fault unless he vindicated himself from the presumption arising from the transaction, a question of credibility is presented for the jury, and they may disregard such testimony: Id.; *Robinson v. New York etc. R. R. Co.*, 20 Blatchf. 338; *Wohlfahrt v. Beckert*, 92 N. Y. 490; S. C., 12 Abb. N. C. 478. A qualification of the general rule above stated may likewise arise out of the nature or subject-matter of the testimony. Thus where the testimony of an unimpeached and uncontradicted witness relates to declarations or conversations happening some time before he is called to testify, and the precise words are important to the point in issue, and the witness, though confident, is not positive in his testimony, the jury may refuse such entire credit as may be necessary to satisfy them that the words in question are fully proved: *Hardin v. Brooks*, 5 Pick. 244.

Juries are not justified in rejecting evidence as being unworthy of belief, on the ground that the witness has been contradicted, unless he was contradicted on a material point in his testimony: *Swan v. People*, 98 Ill. 610. And the rule that the testimony of a witness who has testified falsely as to

any material fact may be disregarded *in toto*, is a rule of permission, and not a mandatory one. The jury may disregard his evidence altogether, but are not bound to do so: *Frierson v. Galbraith*, 12 Lea, 129; *Otmer v. People*, 76 Ill. 149; *Gulliver v. People*, 82 Id. 146; *Swan v. People*, 98 Id. 612; *Hoye v. People*, 6 Northeastern Rep. 796 (Sup. Ct. Ill.); *People v. Sprague*, 53 Cal. 494; *People v. Soto*, 59 Id. 367; and it is only where the falsity is willful that the rule applies: *Id.*; *Callahan v. Shaw*, 24 Iowa, 441; *White v. State*, 52 Miss. 227; *Vicksburg R. R. Co. v. Hedrick*, 62 Id. 28; *Prickett v. Madison County*, 14 Ill. App. 454. If a witness makes a false statement through mistake or misapprehension, the jury ought not to disregard his testimony *in toto*: *Brumam v. People*, 15 Ill. 511; *Callahan v. Shaw*, 24 Iowa, 441. The maxim, *Falsus in uno, falsus in omnibus*, is therefore interpreted to mean, that where a witness willfully testifies falsely to some material matter in a cause, the jury are at liberty to disregard his testimony in other respects, unless it be corroborated by other proof: *Stoffer v. State*, 15 Ohio St. 47; *Mead v. McGraw*, 19 Id. 55; *Dye v. Scott*, 35 Id. 194; *Mercer v. Wright*, 3 Wis. 645; *Lemmon v. Moore*, 94 Ind. 40; *Oliver v. Cameron*, 4 McAr. 237; *Sharp v. City of Erie*, 4 Atlantic Rep. 161 (Sup. Ct. Pa.); *Smith v. Forbes*, 14 Ill. App. 477. Compare *Huber v. Teuber*, 3 McAr. 484, holding that a witness who swears to a deliberate falsehood in relation to a matter the truth of which he must have known, is not to be believed in any part of his testimony, although the fact may not be material: Citing *The Santissima Trinidad*, 7 Wheat. 339. So an instruction to the jury that "if any witness has, in their judgment, sworn falsely in any material respect, he is to be distrusted in all others, and his testimony is not to be accepted and acted on without great caution," was held not to be erroneous, although the word "willfully" was omitted: *People v. Righetti*, 66 Cal. 184.

Intoxication does not destroy the credibility of a witness, but undoubtedly impairs it. If, however, the evidence of one who was intoxicated at the time of the occurrences of which he testifies is corroborated, or his recollection of the transactions appears to be distinct and clear, he is entitled to belief: *State v. Castello*, 62 Iowa, 404.

If the social and business relations existing between the witness and the party calling him are such as usually and ordinarily produce an interest in the mind of the former in favor of the latter, it is for the jury to say to what extent, if any, the relationship impairs or destroys the credibility of the witness: *Michigan Carbon Works v. Schad*, 38 Hun, 71; and see *Kavanaugh v. Wilson*, 70 N. Y. 179; *Collins v. Stephenson*, 8 Gray, 441; *Long v. Lambie*, 9 Cush. 365.

## CHICAGO MARINE AND FIRE INS. CO. v. STANFORD.

[28 ILLINOIS, 168.]

DEPOSITOR MAY DRAW HIS CHECK ON HIS BANKER AT PLEASURE, in the regular course of business, either for the full amount of his deposit or for any part thereof, and the holder of a check may sue for and recover the amount expressed therein.

CHECKS SHOULD BE DRAWN BY DEPOSITOR IN GOOD FAITH, and not for the mere purpose of vexation outside the regular course of business.

ACTION by drawer of check, for use of the payee, to recover against his banker the amount expressed in the check. Plain-



tiff offered the check in evidence, and proved its presentment for payment to the defendant, and the latter's refusal to pay, although the balance in plaintiff's favor was in excess of the amount of the check. Defendant offered in bar evidence of a former suit and recovery by the plaintiff, on another check, of a part of the same account, and insisted that its indebtedness to plaintiff could not be divided into several suits. Judgment for the plaintiff, and defendant assigned error.

*Thomas Hoyne, and McCagg and Fuller*, for the plaintiff in error.

*J. D. Ward and E. F. Runyon*, for the defendant in error.

By Court, CATON, C. J. The decision of the case of *Munn v. Burch*, 25 Ill. 35, was not made till after the most mature investigation and consideration. We have re-examined what we there said, and are but confirmed in the correctness of the principles there laid down. The banker who keeps a deposit account with his customer agrees that the depositor may draw out his deposit in sums as he may find convenient, and that he will pay his checks when presented, and to whoever may present them, whether it be the depositor or another, who may be the rightful holder of them. The agreement is not, as now insisted by the defendant below, that if the depositor checks in his own favor, he shall check for the full amount of his deposit. If the banker finds the depositor a troublesome customer, so that the account is not a desirable one, he may tender the full amount of the deposit, and refuse to receive more, and thus close the account; and after that, if the depositor should refuse to receive the money, his right to draw out the deposit in parcels would be terminated, unless, perhaps, there might be an exception in favor of the *bona fide* holder of his check. But until the account is thus closed, the agreement to pay in parcels continues, and each check drawn *bona fide*, and not for the mere purpose of creating separate demands, does create a separate demand, for which a separate action may be brought by the holder of the check, whether that holder be the depositor or another, as distinct and separate from the general account as would be separate promissory notes for the same amounts. Where there is a real controversy as to the account between the bank and the depositor, and the latter, for the mere purpose of vexation, and not in the regular course of business, should draw small checks, that he might commence separate suits upon them, the courts

would no doubt find an efficient remedy; but there is nothing in this case showing that such was the purpose in drawing the several checks here. For aught that appears, they were drawn *bona fide* in favor of the payees, in the regular course of business. They might have brought actions upon them in their own names, had they so chosen, or they could return them to the drawer and use his name to recover the amount, as they did.

The judgment must be affirmed.

Judgment affirmed.

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BANK HOLDS MONEY OF DEPOSITORS subject to be checked for as their agent. Either the drawer or payee of a check can maintain an action against the bank for the amount of the check, unless deprived of the right by some act of his own: *Vanbibber v. Bank of Louisiana*, 74 Am. Dec. 442.

THE PRINCIPAL CASE IS CITED in *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, to the point that after a check has passed into the hands of a *bona fide* holder it is not in the power of the drawer to countermand the order of payment.

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## HERRON v. PEORIA MARINE AND FIRE INS. CO.

[28 ILLINOIS, 235.]

**ACTION OF COVENANT WILL LIE ON SEALED POLICY OF INSURANCE**, renewed by a parol receipt, where the policy provides for the continuance of itself by its own terms, on the payment of the premium and taking a receipt therefor.

**ORIGINAL APPLICATION FOR INSURANCE NEED NOT BE SET OUT IN PLEADING**, in action on policy. The insured is not bound to prove the truth of his representations; but they are subject to attack by the defendant, and if he shows their falsity in a material part, the former cannot recover.

**NOTICE OF LOSS NEED NOT BE GIVEN TO SECRETARY OF INSURANCE COMPANY** in person, and is sufficient if given and received at the company's office or place of business.

**AVERMENT IN ACTION ON INSURANCE POLICY THAT NOTARY WHOSE CERTIFICATE FORMED PART OF PRELIMINARY PROOF OF LOSS** was the nearest notary to the place of the fire, is unnecessary, where the certificate was received by the company without objection.

**INSURANCE COMPANY INTENDING TO EXCEPT TO FORMAL DEFECT IN PROOF OF LOSS** should do so in time for the insured to remedy it, otherwise it will be regarded as waived by the company.

THE opinion states the case.

*Manning and Merriman*, for the plaintiff in error.

*H. Grove*, for the defendant in error.

By Court, BREESE, J. As we understand the record in this case, the only important question presented is the sufficiency of the second count of the declaration as amended, to which a demurrer was sustained in the court below.

The action was covenant on a policy of insurance, bearing date the first day of September, 1855, and sealed with the seal of the Peoria Marine and Fire Insurance Company, the defendant.

Condition 13 of the policy is in these words: "Insurance once made may be continued for such further term as may be agreed on, the premium being paid, and a renewal receipt given for the same; and it shall be considered as continued under the original representation, in so far as it may not be varied by a new representation in writing, which, in all cases, it shall be incumbent on the party insured to make when the risk has been changed, either within itself or by the surrounding or adjacent buildings."

The amended second count, after setting out the conditions attached to the policy, one of which is copied above, alleges that defendants made their certain policy of insurance for the period of one year, subject to certain conditions thereunto attached; one of which conditions provided that insurance once effected might be continued for such time as might be agreed on, the premium being paid by the insured, and a renewal receipt being given therefor; that in pursuance of such condition, the policy sued on was, by the payment of the premium, and the granting of the renewal receipt, continued in force until the time of the destruction of the insured premises by fire; that the plaintiff was interested in the premises when burned; that the fire did not happen in such a way as to bring it within any of the exceptions of the policy, all of which are specifically enumerated; that plaintiff has complied with each and all of the conditions precedent, which are specifically set forth, and that the defendants have failed to perform their covenants.

The point is, Will covenant lie, on the case as presented by this count?

The defendant contends that as the renewal receipts show new and distinct agreements, enlarging risk and extending the time, and are not under seal, *assumpsit*, and not covenant, is the proper action.

We do not perceive in the pleadings any averment of any fact from which it could be inferred there had been an in-

crease of risk, or any change in the terms of the original policy, by any subsequent parol agreement or contract. It attempts, and we think successfully, to avail of condition 13, by averring payment of the premium and the execution by the company of a renewal receipt for the same, which, by force of the condition, continues the original policy.

It is not like the case of *Luciani v. Am. Fire Ins. Co.*, 2 Whart. 172. The policy in that case contained no such provision as this. In that case, parol agreements had been indorsed on the original policy, variant from the policy, and the policy contained no covenant that it should be continued by such agreements. It seems to indicate most clearly that a new policy was to be executed upon the payment of the current premiums, since there is a stipulation that there shall be no charge for such new policy.

This policy continues itself by its own terms on the performance of the condition precedent, to wit, the payment of the premiums, and taking a receipt therefor. This is the mode agreed upon by the parties for continuing the policy, and not by executing a new one. We think this is very clear, and the company should not be allowed to repudiate their agreement. They have received the premiums, and given the renewal receipts, the effect of which, as they well understood, was to continue the original policy. These receipts are no new contracts, but merely evidence that the condition of the policy has been complied with by the assured.

The objection that the original application for insurance, being a condition precedent, is not set out, we think is not sound. We do not think the assured is bound to set out and prove the truth of his representations. They are subject to attack by the defendant, and if he shows their falsity, if material, the assured cannot recover.

As to the objection that notice was not given to the secretary of the company of the loss, it is sufficient if it was given and received at the office of the company.

As to the last objection of the want of an averment that Bailey, whose certificate formed a part of the preliminary proof required by the terms of the policy, was the notary nearest to the place of the fire, it is sufficient to say that the certificate was received, for aught that appears, by the insurance company without any objection. As we said in the case of *Great Western Insurance Co. v. Staaden*, 26 Ill. 365, good faith and the principle of fair dealing required that the com-

pany, if intending to insist upon this formal defect in the proof, should in a reasonable time have notified the assured, so that the defect might have been remedied. We must hold that this defect was waived by the company. The judgment is reversed, and the cause remanded, with leave to the defendant to plead to issue.

Judgment reversed.

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CONDITIONS SUBSEQUENT NEED NOT BE SET OUT IN PLEADING in an action upon a policy of insurance: *Forbes v. Am. Mut. Life Ins. Co.*, 77 Am. Dec. 360.

NOTICE OF LOSS TO INSURER, AND WAIVER THEREOF: *Trask v. State Fire and Marine Ins. Co.*, 72 Am. Dec. 622, and note; *Spring Garden etc. Ins. Co. v. Evans*, 66 Id. 308.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW MODE OF PAYMENT OF PREMIUM, although the written proposals state that the insurance shall not be binding until the premium is paid: *Sheldon v. Conn. Mut. Life Ins. Co.*, 65 Am. Dec. 565.

THE PRINCIPAL CASE IS CITED AND FOLLOWED as to the effect of a renewal receipt in continuing a policy of insurance, in *New England etc. Ins. Co. v. Wetmore*, 32 Id. 243. It is cited to the point that in the absence of any provisions to the contrary, the delivery of proofs of loss to the local agent will be taken and considered as a delivery to the insurance company, for all the purposes of the policy, in *Ins. Co. of North America v. Hope*, 58 Ill. 78; and is distinguished in *Peoria etc. Ins. Co. v. Hervey*, 34 Id. 67.

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## DURHAM v. HEATON.

[28 ILLINOIS, 264.]

ALL VOIDABLE PROCESS CAN BE MADE PERFECT BY PROPER AMENDMENTS, but void process cannot be.

DEFECTIVE AND VOIDABLE EXECUTION CAN BE AMENDED BY JUDGMENT as well after as before the sale, and parol proof by the keeper of the records is admissible to show the identity of the execution.

PURCHASER AT EXECUTION SALE, OTHER THAN PLAINTIFF IN WRIT, will not be defeated in his title by any defect or irregularity in the execution.

REGULARITY OF PROCESS CANNOT BE QUESTIONED COLLATERALLY BY STRANGER TO SALE UNDER EXECUTION.

REVIVAL OF JUDGMENT IN NAME OF ADMINISTRATOR results from the filing of his appointment for record, and an execution may issue in his name.

LIEN OF JUDGMENT IS GIVEN TO ALL COURTS OF RECORD, and a judgment in the supreme court creates a lien co-extensive with the jurisdiction of that court.

LIEN OF JUDGMENT IS NOT RELEASED BY DEATH OF JUDGMENT CREDITOR.

THE opinion states the case.

B. C. Cook, for the plaintiffs in error.

Leland and Blanchard, for the appellee.

By Court, BREESE, J. The solution of the question presented by this record depends entirely upon the validity of the execution under which the land was sold, and which issued out of the supreme court, in favor of Lewis, administrator, against Lindley and Doolittle. If that execution was not void, then the title of appellants to the premises in controversy was clearly made out.

The appellee insists that the execution is void, it being materially variant from the judgment; and that it was not competent to prove by parol that the execution did in fact issue upon the judgment. That should appear from inspection.

The fact of variance is conceded. The judgment was recovered December 16, 1837, in favor of William Dougherty, against Oliver Lindley and Irwin B. Doolittle, in the supreme court of this state, for the sum of \$3,441.41. On this judgment an execution issued December 26, 1837, and duly returned in part satisfied, as appears by the deposition of William A. Turney, Esq., clerk of the supreme court, and having custody of the records and files of the court in which the judgment was rendered. This deposition proves also the loss of this execution. Some time in 1839, the judgment being unsatisfied, the judgment creditor died, and an administrator on his estate was duly appointed by the proper court, who, in 1841 or 1842, caused to be recorded in the supreme court his letters of administration, and afterwards, on the eighth day of July, 1843, caused an execution to be issued out of said court upon this judgment, in the name of the administrator, and directed the same to the sheriff of Bureau County to execute. The sheriff of Bureau County duly levied the writ upon the land in controversy, and sold the same according to law, and executed a deed to the purchaser, through whom, it is not denied, the title is clear to the appellant. Here comes in the objection. The execution under which the levy and sale was made recites a judgment against Lindley and Doolittle for the sum of \$4,113.56, \$14.18 $\frac{1}{2}$  costs in the circuit court of Tazewell County, and \$10.07 costs in the supreme court,—a vast discrepancy between this amount and the amount of the judgment as rendered, even with interest added. Now the question comes up, Can a stranger to the judgment and execution, and to all the proceedings under it, take advantage of this variance in a collateral proceeding?

This involves the question, Is such an execution so variant

as it is from the judgment void, or voidable only? One proposition includes the other. A void writ has no vitality, and nothing exists by which it can be amended,—the breath of life cannot be infused into it, and it is a nullity. Not so with a writ voidable only. Such a writ, if a summons, can be amended by the precipe; if a *fi. fa.*, by the judgment, and all acts done under it are valid and binding, until set aside. All voidable process can be made perfect by proper amendments; void process cannot be. An instance of the first kind is seen in this execution; the other kind will be seen in a writ issued by a court or magistrate not having jurisdiction of the subject, or of a writ from a court of record without a seal, or where there was no judgment. It is impossible to amend such writs, they being void in the inception.

The defendant, however, insists that the variance is so great as to compel the inference it did not issue on the judgment recovered, and that parol proof cannot be received to show its identity. He insists that the records of a court must prove themselves. As a general principle this is true, but where it is shown to the court, by the keeper of the records of a court, that there is no other judgment on those records than the one in question, the proof is as complete as if the records were present to be inspected. The fact is so, or it is not so, and that is to be determined by the records, either by inspection or by the sworn testimony of the keeper, who has carefully examined and searched them, with a view to establishing the fact.

Can this party take advantage of this objection, he being a stranger to the proceedings? If it was raised by the debtor himself, a different question would be presented, but even as regards him, the execution would not be void, and a party, not the plaintiff in the writ, purchasing the land under the sale made under the writ, would hold the land. The process would stand good until avoided in a proper manner. The defect in it cannot be taken advantage of by any one in a collateral action; its validity was not affected by the variance; it was amendable at any time as well after as before the sale: *Jackson v. Anderson*, 4 Wend. 478. So in *Phillips v. Coffee*, 17 Ill. 154 [63 Am. Dec. 357], this court held that a purchaser at a sheriff's sale, who is not a party to the proceedings, having a good deed, will not be defeated in his title by any defect or irregularity; he relies upon the judgment, levy, and deed; all other questions are between the parties to the judgment and



the officer. A stranger to the proceedings cannot question them collaterally: *Swiggart v. Harber*, 4 Scam. 364 [39 Am. Dec. 418]; *Rigg v. Cook*, 4 Gilm. 336. Whilst no one is bound by acts done under void process, those are binding which are done under erroneous or voidable process, and cannot be successfully assailed except by a direct proceeding to set them aside, not by a "side-wind."

The defendant, however, contends that the execution on which the sale was made was never regularly issued from the supreme court, for the reason that the judgment was never revived in that court in favor of the administrator, and that his letters of administration were never recorded in the supreme court. Previous to the act of 1840, concerning judgments and executions, the only mode by which a judgment could be revived at law, against a deceased debtor, was by *scire facias*, a mode attended with great delay and expense.

The act of 1840, section 40, is as follows: "The collections of the judgments of courts of record shall not be delayed or hindered by the death of the plaintiff or person in whose name the judgment shall exist, but the executors or administrators, as the case may be, may cause the letters testamentary or of administration to be recorded in the court in which the judgment exists, after which execution may issue, and proceedings be had thereon in the name of the executor or administrator, as such, in the same manner that could or might be done or had if the judgment exists and remains in the name and favor of the executor or administrator, in his, her, or their capacity as such executor or administrator": Scates's Comp. 610.

The clerk of the supreme court testified that the record of his court showed that letters of administration upon the estate of William Dougherty, who died intestate March 15, 1840, were granted to Thomas Lewis, public administrator, by James Adams, probate justice of the peace of Sangamon County, of the state of Illinois, August 23, 1842. This, the clerk states, is duly entered upon the records of the court, and makes an exhibit of such entry. This, it is insisted, is not a compliance with the statute,—that requiring that the letters should be recorded in the court. The language of the statute is, the administrator shall "cause them to be recorded," not that they shall have no operation until they are actually recorded. All that the administrator could do would be to bring his letters into court, that the court may see he was no pretender, but possessed the character he claimed. It was the business

of the clerk to record them, and if he failed to do it, the administrator should not suffer or be put in peril. He presented to the court his letters of administration duly granted, the effect of which should be, as the statute contemplated, to revive the judgment in his name, with power to issue an execution in his name.

The execution was properly issued in the name of the administrator. But it is objected that it does not recite the execution was on a judgment obtained by William Dougherty against Lindley and Doolittle, but as a judgment recorded by Thomas Lewis, administrator of William Dougherty, and is in that respect not identical with the judgment actually rendered in 1837. The execution would have been more formal and precise if there had been an additional recital in it to this effect: which William Dougherty in his lifetime recovered, etc., and which judgment has been revived in the name of Thomas Lewis, administrator, etc. But it is, as it reads, a literal compliance with section 40. Execution is to issue and proceedings be carried on after recovering the letters, in the name of the administrator. This, too, is an objection made by a stranger to the proceedings, and if valid, could not prevail in his behalf.

It is also insisted by the defendant that the lien of this judgment rendered in 1837 did not reach beyond the county where the judgment was rendered, and could not be effectual in another county, certainly not without levy and notice of record in the county where the lands were situate, or against a *bona fide* purchaser whose deed was recorded prior to the levy. He further contends that our statute does not make, and did not intend to make, judgments of any court, except courts of original jurisdiction, liens upon real or other estate. Section 1 of chapter 57, title, Judgments and Executions, provides that all and singular the goods and chattels, lands, etc., of every person against whom a judgment has been or shall be obtained in any court of record, either at law or in equity, for any debt, etc., shall be liable to be sold upon execution, etc.; and the said judgments shall be a lien on such lands, etc., from the last day of the term of the court in which the same may be rendered, for the period of seven years; provided, that execution be issued at any time within one year on such judgments, etc.: Scates's Comp. 602, 603.

We perceive no restriction to judgments of courts of original jurisdiction, but it is general to any and all courts of record, and we see no reason for such restriction.

At the common law, a judgment created no lien upon the lands of a defendant. The land was made liable to satisfy the judgment under an *elegit*, a writ given by the statute of Westminster, 2, 13 Edw. I., c. 18, and this, it has been held by the courts of England, gave a lien on the lands of the judgment debtor.

It has been the policy of our law, from our earliest history, to subject real estate to the payment of debts, and our present statute, which we have cited, is nothing more than a copy of the law which was in force when this state formed a part of the territory northwest of the river Ohio, and subsequently a part of the territory of Indiana, differing, however, in this, that our present statute limits the lien to seven years.

It gives a lien upon all the lands of a defendant on all judgments rendered in a court of record.

This provision is very sweeping and extensive, and does not in terms restrict the lien of a judgment in the circuit courts to the lands lying within the county in which the court is held, and has been so restricted only by the judicial decision to such county: *Bustard v. Morrison*, 1 Scam. 235. The limits of the state, in the exercise of the jurisdiction of the supreme court, is as the limits of a county to a circuit court; consequently, if the lien of a judgment is limited to the county in which the court exercises its jurisdiction, so must the lien of a judgment rendered by the supreme court extend throughout the state, since to that extent could its jurisdiction be exercised when this judgment was rendered.

Was it not for the decision above cited, one member of the court would be inclined to hold the true test and principle to be that the lien of a judgment should extend to all the lands of the debtor which can be reached by an execution issuing out of the court where the judgment is rendered. The jurisdiction of the circuit courts to enforce their judgments extends throughout the state, as an execution can be issued to any county in the state. The lien, then, should be co-extensive with the jurisdiction. And from this no injury could result, the judgment creditor being required to file his lien in the distant county. The supreme court having jurisdiction co-extensive with the limits of the state, its judgments must create a lien to the same extent.

The defendant argues against this, that great injustice might be done, by extending the lien of such judgments, as no record notice of them is required to be made in the counties where

such lands may be subject to them. This can be provided against by the legislature. We can only determine what the law is on a given state of case. It seems a necessary regulation that judgments of the supreme courts, to create a lien on lands in every county in the state, should be docketed in the office of the clerk of the circuit court of such county, which would operate as notice. In this case, the law did not require it, and no one has a right to complain that the parties interested in recovering this judgment took the proper steps to enforce it against property bound for its payment, although sold to a subsequent purchaser previous to the issuing of the execution. The judgment was notice of itself—the law implies notice to all subsequent encumbrancers and purchasers.

The defendant further argues that the lien was released, if it ever existed, by the death of the judgment creditor. The statute is different. The forty-first section of the act we have referred to provides that “the lien created by law on property shall not abate or cease by reason of the death of any plaintiff or plaintiffs; but the same shall survive in favor of the executor or administrator of the testator or intestate, whose duty it shall be to have the judgment enforced as aforesaid”: Scates’s Comp. 610.

We perceive no defect in the title set up by the plaintiff in error, and the issue should have been found for him upon the facts. The circuit court having entertained a different view, its judgment must be reversed, and a new trial had.

Judgment reversed.

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AMENDMENTS OF EXECUTION, and in what matters allowed: See *McCullum v. Hubbert*, 48 Am. Dec. 56; *Purcell v. McFarland*, 35 Id. 734; *Bybee v. Ashby*, 43 Id. 47; *Doe v. Rue*, 29 Id. 368; *Miller v. Alexander*, 65 Id. 73.

AMENDMENT OF RETURNS TO WRITS: See *Malone v. Samuel*, 13 Am. Dec. 173, and note.

REVIVAL OF JUDGMENTS: See *Union Bank v. Powell*, 52 Am. Dec. 367; *Dibble v. Taylor*, 42 Id. 368; *Baxter v. Dear*, 76 Id. 89.

LIEN OF JUDGMENT, EXTENT OF, ETC.: *Ackley v. Chamberlain*, 76 Am. Dec. 516; *Isaac v. Swift*, 70 Id. 698; *Young v. Templeton*, 50 Id. 563; *Andrew v. Wilkes*, 38 Id. 450; *McClung v. Beirne*, 34 Id. 739; *Buchan v. Sumner*, 47 Id. 319, note.

THE PRINCIPAL CASE IS FOLLOWED, as it respects the amendment of an execution, in *Lewis v. Lindley*, 28 Ill. 149; and is cited in the following cases, and to the point stated: The defective description in a deed of a judgment will not vitiate the deed, where there is proof that no other judgment existed answering the description in other respects on the records of the court in which the judgment was recited to have been rendered: *Johnson v. Adleman*, 35 Id. 281. The provisions of the statute for the revival of a judgment is

the name of a personal representative apply to judgments, the lien whereof has not expired: *Scammon v. Stewart*, 35 Id. 345. A variance between the amount stated in an execution and the judgment is an irregularity which renders the writ voidable, and subject to be set aside upon the application of the judgment debtor to the court whence it issued, but does not render the writ void: *Newman v. Willits*, 60 Id. 521.

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## ILLINOIS CENTRAL R. R. Co. v. BUCKNER.

[28 ILLINOIS, 299.]

**DEAF PERSON IS GUILTY OF NEGLIGENCE**, who attempts to drive an unmanageable horse across a railroad track when a train is approaching. It is his duty to keep a vigilant lookout, in order to see and avoid the danger.

**PERSON MUST HIMSELF SUFFER CONSEQUENCES OF CARELESS ACT**, no matter what motive may have prompted the act.

THE opinion sufficiently states the facts.

*Douglass, Wood, and Long, and B. C. Cook*, for the appellant.

*Joiner, Blades, Fletcher, and Kay*, for the appellee.

By Court, CATON, C. J. However our sympathies may be with the plaintiff below, the law must take its course. Whatever dispute there may be about the speed at which the train was running, there are other facts about which there is no dispute. Whether this be a regular road-crossing of the track or not, it is not controverted that the plaintiff approached the crossing from the west in such a position that he could see the train for a considerable distance if he had looked, and could have heard it for near half a mile, according to the testimony of his own witnesses, if he had possessed the faculty of hearing in an ordinary degree. Dr. Warner says a person two hundred feet from the crossing could see down the track; and Mrs. Warner says: "Any person of ordinary hearing could have heard the cars. I could have heard them if I had been where I saw Mr. Buckner." But he did not hear them. He was, to a degree, deaf. He was driving a colt three or four years old, which appears to have been fractious or timid. When he got on the track, the colt became frightened and ran up the track, or north on the track, from the approaching train, and was overtaken by it some distance north of the crossing; according to the testimony of all the witnesses, and as the engineer testifies, many yards from the crossing. Mrs. Warner says, when the plaintiff got upon the track the cars

were at Leonard's corn-crib, when the horse became unmanageable and ran north upon the track, towards the depot. John Buckley says: "When Buckner went on the track the cars were forty or fifty yards off. . . . The horse turned to the north; the wagon was on the track." On this state of facts, the court was asked to instruct the jury, for the defendant, that the plaintiff had no business upon the track above the crossing, and that he was there of his own wrong and at his own risk, if without permission, and that he could not recover for an injury there sustained, unless willfully committed by the defendant. This the court gave with this explanation: "This would not apply, if the jury should believe, from the evidence, that the horse rushed on the track north of the crossing to avoid the engine, or the plaintiff turned him that way for that purpose." This threw upon the defendant the consequences of acts of the horse in rushing up the track from the impulse of fear, or of the acts of the plaintiff arising from the same cause, although it may have been, as indeed it appears to have been, the most reckless course that could have been taken, if it was the voluntary act of the plaintiff. But it was no doubt the act of the horse in a state of alarm, he having become unmanageable, rushing to destruction in the shortest and most obvious way possible. And to this uncontrollable act of the horse is this accident attributable. If he had time to go ten yards up the track before he was overtaken by the train, which was forty or fifty feet from him when the wagon was on the track, and necessarily the horse across it, it is difficult to perceive why he could not have crossed the track before the train would have reached it had he kept on at the same speed. That would seem to be demonstrable as a mere question of time and distance. Now who must be responsible for this act of the horse? Undoubtedly, the plaintiff who owned him, and who drove him there, without knowing that he was reliable. But the court told the jury, if the plaintiff turned him there to avoid the engine, then he was there rightfully. That would depend upon whether that was a judicious and proper course to avoid the danger. If it was a careless or reckless running into danger to go there, then the plaintiff must himself suffer the consequences of that act, no matter what motive may have prompted the act. This explanation of the instruction was wrong.

But without this, it seems to us, that there was a great want

of proper care in the plaintiff, knowing as he did that he could not hear an approaching train like ordinary persons, in not keeping a vigilant lookout that he might see it, when approaching a railroad-crossing. That he could have seen the train had he looked down the track with a vigilant attention, there can be no doubt; and it is equally apparent that if he had seen its approach, he could, and no doubt would, have avoided the danger, and have saved himself this great calamity. This is even a stronger case of inattention and carelessness on the part of the plaintiff than was that of *Chicago and Rock Island R. R. Co. v. Still*, 19 Ill. 499 [71 Am. Dec. 236], though in some of its features very much like it.

We must reverse the judgment, and remand the cause.

Judgment reversed.

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**WHETHER NEGLIGENCE EXISTS** is ordinarily a question of fact at common law, and frequently depends upon a great variety of circumstances: *Sawyer v. Eastern Steamboat Co.*, 74 Am. Dec. 463. Compare *Gerke v. Cal. Steam Nav. Co.*, 70 Id. 650.

**PASSENGER IN RAILROAD CAR IS NEGLIGENT**, if, knowing that the train is in motion, he goes out on the platform of the car, and steps therefrom upon the platform of the station while the car is still in motion: *Gavett v. Manchester etc. R. R. Co.*, 77 Am. Dec. 422; and see *Ingalls v. Bills*, 43 Id. 355, note; *Lucas v. New Bedford etc. R. R. Co.*, 66 Id. 406, and note.

**PROOF OF NEGLIGENCE IN ACTIONS FOR PERSONAL INJURIES**: See *Faria v. Reigle*, 62 Am. Dec. 679, and note; *Sullivan v. Phila. etc. R. R. Co.*, 72 Id. 698.

**THE PRINCIPAL CASE IS CITED** to the point that the duty of a railroad company to give suitable warning of danger at a common road-crossing, does not justify a person at such crossing in omitting any proper act of vigilance on his part to avoid a collision, in *Chicago etc. R. R. Co. v. Gretener*, 46 Ill. 84.

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## GALENA INSURANCE COMPANY v. KUPFER.

[28 ILLINOIS, 332.]

**TERMS "CURRENCY," "FUNDS," AND "CURRENT FUNDS," DEFINED.**

**HOLDER OF CHECK DRAWN FOR "CURRENT FUNDS" MAY DEMAND COIN,** or funds equal in value to the current coin of the country.

**EXTRINSIC EVIDENCE IS NOT ADMISSIBLE** to change the meaning of a word having a general well-defined signification, but if a word is employed which has no definite and specific general meaning, its local meaning may be proved.

**HOLDER OF CHECK DRAWN FOR CURRENT FUNDS IS NOT BOUND TO RECEIVE DEPRECIATED PAPER**, in a case where the drawer of the check has not provided proper funds for its payment.



**PARTY DRAWING UPON ANOTHER FOR CURRENT FUNDS MUST PROVIDE SUCH FUNDS** for payment of the draft, and failing to do so, it is the same as if no funds were provided.

**THE facts are sufficiently stated in the opinion.**

*M. Y. Johnson*, for the appellant.

*E. S. Leland and L. Shissler*, for the appellee.

By Court, WALKER, J. This was an action of *assumpsit*, instituted on a check drawn by appellee in favor of appellant, on the Bank of Galena. The check was for current funds, and when presented for payment, depreciated Illinois bank paper was offered and refused. The funds offered in payment were worth from fifty to sixty cents on the dollar. A trial was had, resulting in a judgment in favor of appellant for \$280.75, the depreciated value of the bills. The check was given by appellee in payment of a bill on appellee, held by appellant for collection. The appellant had paid for this draft four hundred dollars in money.

Does "current funds" mean depreciated bank bills, worth only fifty or sixty cents on the dollar? This is the precise question, and upon its answer depends the correctness of the judgment below. Appellee received, in value, four hundred dollars for this check. Then, by the terms of the agreement, did appellee have the right to pay the four hundred dollars to appellant, if the check was not met by the bank, with \$240 and accruing interest? The question was not what kind of funds appellee had in the bank, and against which he had a right to draw, but what kind of funds did he direct to be paid to appellant? If his deposits in the bank consisted of depreciated bank paper, and he drew for par funds, it was his duty to provide such funds to meet the draft, or if returned for non-payment, then to have taken up the draft with such funds. Any arrangement between the bank and appellee, as to what kind of funds his checks should be met with, was an arrangement with which appellant had no concern, and by which he cannot be affected without his consent.

Currency is bank bills, or other paper money, which passes as a circulating medium in the business community, as and for the constitutional coin of the country. They are that description of bank bills which supply the place of coin. The term "funds," as employed in commercial transactions, usually signifies money. Then the term "current funds," means current money, par funds, or money circulating without any discount.

This check, then, called for, and appellant had the right to demand, funds equal in value to the current coin of the country. Such as is received and paid on debts, in the purchase of property, and in ordinary business transactions, at par, and without any discount. This the bank refused to pay, and then the appellant had the right to resort to appellee to recover that sum.

The third instruction asserts that the term "current funds" may be shown by evidence to have a local meaning. When a word has a general well-defined signification, it is not competent to change that meaning by evidence. On the contrary, if a word is employed which has no definite and specific general meaning, its local meaning may be proved. It was so held in reference to the term "season," when employed to limit the time in which grain should be shipped: *Myers v. Walker*, 24 Ill. 133. In that case, no usage or definition of the term as employed, of which the court could take notice, could be applied, so as to ascertain the meaning of the parties; and to prevent the failure of the contract, extrinsic evidence had to be resorted to to give it effect. There the court could see that the term as employed was, without proof of a local usage, without meaning, and that it must have been employed with a local signification. Not so in the case under consideration. This term is well defined, is used in its ordinary sense, and is well and generally understood by all classes of business men. Words having a well-defined specific meaning, imparting the intention of the parties, cannot be altered, limited, or enlarged in their meaning by extrinsic evidence. This term is of this latter character.

It is however insisted that in the case of *Moore v. Morris*, 20 Ill. 255, a different rule is announced. It was there held that current money of this state is the constitutional coin, or foreign coin made current by Congress. It is also said in that case that this is true, unless there is evidence giving these terms a local signification. This is unquestionably true; but the case goes too far, by holding that this may be shown by extrinsic evidence. To produce that effect, the evidence should be found in the contract or agreement itself.

The other instructions proceed upon the supposition that this check was drawn upon a particular fund, and that if it depreciated, and loss ensued to the drawer by a delay in presenting the check, that appellant must sustain that loss. We have seen that this check was not for Illinois bank paper,

which the appellee had on deposit at the bank, but it was for money or its equivalent. The appellee had provided no such funds to meet this check. He had no funds in the bank which appellant was bound to receive, and if loss ensued by depreciation, it could not be attributed to appellant. The funds which appellee had in the bank, instead of being current, were, when the draft was drawn, at from ten to fifteen per cent discount. In this view of the case, the first and second of defendant's instructions should have been refused.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

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PAYMENT IN WORTHLESS OR BADLY DEPRECIATED BANK BILLS is not a valid payment: *Gilman v. Peck*, 34 Am. Dec. 702, and note 704.

PAYMENT IN GENUINE BANK NOTES CIRCULATING AS CURRENCY IS BINDING: *Ware v. Street*, 75 Am. Dec. 755.

MEANING OF WORDS IN PARTICULAR PART OF COUNTRY, or among certain classes of men, may be shown, and the words may be given a particular signification instead of the one generally given: *Thompson v. Sloan*, 35 Am. Dec. 546.

THE PRINCIPAL CASE IS FOLLOWED in *Marc v. Kupfer*, 34 Ill. 292, as to the second and third points stated in the *syllabus*. It is cited to the point that "current bank bills" mean precisely the same thing as currency, in *Osgood v. McConnell*, 32 Id. 77; to the point that bills drawn for current funds are drawn for cash, or paper money equivalent thereto, in *Wood v. Price*, 46 Id. 437; and to the point that where a party draws for current funds, the payee is not bound to receive depreciated paper, in *Laurence v. Schmidt*, 35 Id. 443. It is harmonized in *Willett v. Paine*, 43 Id. 435, where it is said that the principal case was decided upon the theory that "the bank bills on deposit were depreciated at the time of deposit, and were deposited as depreciated paper, in which event, the court decided the depositor would have no right to draw for par funds, or to expect payment of a check thus drawn."

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## WALKER v. BROWN.

[23 ILLINOIS, 373.]

EXPRESS AND IMPLIED CONTRACT FOR SAME THING cannot exist at the same time.

AFTER PERFORMANCE, PLAINTIFF MAY RECOVER ON SIMPLE CONTRACT the price of the service, under an *indebitatus assumpsit*, but the contract must regulate the amount of the recovery.

RIGHT TO BRING INDEBITATUS ASSUMPSIT FOR MONEY DUE ON EXECUTED CONTRACT does not entitle the party to set aside the contract, and sue on a *quantum meruit*.

WHERE WORK AND LABOR IS PERFORMED UNDER CONTRACT, suit must be between the parties to the contract; and third persons, though benefited

by the work, cannot be sued upon an implied *assumpsit* to pay for that benefit.

**IMPLIED UNDERTAKING CANNOT ARISE**, as against one benefited by work performed, when such work was done under a special contract with other persons.

**ASSUMPSIT.** The opinion states the case.

*Scates, McAllister, and Jewett*, for the plaintiff in error.

*Gallup and Hitchcock*, for the defendants in error.

By Court, BREESE, J. The record shows that the contract under which this work was done was a sealed contract. The parties agree that the work was commenced and prosecuted under this contract, and the price fixed by it was fourteen hundred dollars.

The defendants, after performing the work under this agreement, now abandon it, and bring this suit upon an implied promise in law to recover the value of the services rendered, and the jury, under the instruction of the court, have assessed their damages to \$1,840, being \$440 more than the ratable price as expressed in the contract, and under and for which it was performed.

The question for our consideration comes up on the refusal of the court to give the following instruction asked for by the plaintiff in error: "If the jury believe, from the evidence, that the plaintiffs entered into a contract in writing, and under seal, with Thomas Shergold and others,—the contract read in evidence—and performed the work sued for under said contract, then the jury will find for the defendant."

This refusal is the error now insisted upon. This instruction, like the second and fourth, which the court modified, presents substantially the question whether the contract under which the work was performed is to govern the remedy and right of recovery. We have no doubt, in reason and on authority, the contract must govern; and so believing, the modifications of the second and fourth instructions, and the refusal to give the one here copied, were erroneous.

As in physics, two solid bodies cannot occupy the same space at the same time, so in law and common sense, there cannot be an express and an implied contract for the same thing, existing at the same time. This is an axiomatic truth. It is only when parties do not expressly agree, that the law interposes and raises a promise.

The error in this whole proceeding arises upon the assump-

tion that the plaintiff in error might become liable, under the implication of the law, that he should pay the reasonable worth of services, beneficial to him, bestowed upon his property, with his knowledge and acquiescence, notwithstanding such services were rendered under an express agreement with another person.

An express contract, executory in its provisions, must totally exclude any such implication. One party agreed, in consideration of the other to pay, to render the service; the other, in consideration of the promise to render the service, agrees to pay. One is the consideration and motive for the other, and each equally excludes any other consideration, motive, or promise.

In *Touissant v. Martinnant*, 2 Term Rep. 104, Ashhurst, J., says: "But when a party will not rely on the promise which the law will raise, but takes a bond as a security, then he has chosen his own remedy, and he cannot resort to an action of *assumpsit*. Therefore, in this case, his only security is on the bond." Again he says: "But still the bond was their remedy, and they shall not be permitted to change their security upon a subsequent event, and resort to that indemnity which the law would have raised." Buller, J., says: "Now, why does the law raise such a promise? Because there is no security given by the party. But if the party choose to take a security, there is no occasion for the law to raise a promise. Promises, in law, only exist where there is no express stipulation between the parties. In the present case, the plaintiffs have taken a bond, and therefore they must have recourse to that security."

In the case of *Cutler, Adm'x, v. Powell*, 6 Term Rep. 324, Lord Kenyon, C. J., said: "That where parties have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom in the law. Here, the defendant expressly promised to pay the intestate thirty guineas, provided he proceeded, continued, and did, his duty as second mate in the ship from Jamacia to Liverpool"; and Ashhurst, J., said: "It has been argued, however, that the plaintiff may now recover on a *quantum meruit*, but she has no right to desert the agreement; for wherever there is an express contract, the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage."

The whole current of authorities seems to bear in this direction. We have examined some of them: *Young v. Preston*, 4 Cranch, 239; *Raymond v. Bearnard*, 12 Johns. 274 [7 Am. Dec.

817], and cases there cited; *Whiting v. Sullivan*, 7 Mass. 109; *Robertson v. Lynch*, 18 Johns. 456.

This case shows, if work is in fact done under a special contract, the plaintiff cannot recover under a *quantum meruit*. In this case, the work was done under a special contract made with a party assuming to act for the plaintiff in error, and the recovery must be had on that contract.

See also *Miller v. Watson*, 4 Wend. 275; *Wright v. Butler*, 6 Id. 284 [21 Am. Dec. 323]; *Vandenheuvel v. Storrs*, 3 Conn. 203, and cases there cited; *Shepard v. Palmer*, 6 Id. 100; *Hulle v. Heightman*, 2 East, 145; *Pringle v. Samuels*, 1 Bibb, 172 [13 Am. Dec. 214]; *Christy v. Price*, 7 Mo. 433.

When the contract has been performed, the plaintiff may recover on simple contract the price of the service, under an *indebitatus assumpsit*, but the contract must regulate the amount of the recovery: *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Holmes v. Stummel*, 24 Ill. 370.

This distinction, as to the form of the remedy upon executed or executory contracts, is fully laid down and recognized, and is perfectly consistent with the principle excluding implications when express contracts exist: *James v. Cotton*, 7 Bing. 266; S. C., 20 Eng. Com. L. 125; *Kimball v. Tucker*, 10 Mass. 195; *Londregon v. Crowley*, 12 Conn. 561; *Charles v. Dana*, 14 Me. 383; *Mead v. Degolyer*, 16 Wend. 637; and numerous other authorities might be cited to the same effect. It follows, then, that suit must be brought against the parties to this contract. They have made it in the form that suited them best, and that must be the ground of action and measure of relief: *Parker v. Emery*, 28 Me. 494.

The reason of the rule is plain. Parties are bound by their agreement, and therefore there is no ground for implying a promise when there is an express contract, and it can make no difference whether the contract is made by the parties themselves or by others for them. The contract must be sued on. The defendants seem to have misconceived the doctrine.

Although the contract may be a subsisting unexecuted contract, and on that account requires a suit on the instrument itself, yet the right to bring *indebitatus assumpsit* for money due on an executed contract does not entitle the party to set aside the contract and sue on a *quantum meruit*. It is a question as to the form of the action. But whether it be a general count on an *indebitatus assumpsit* or a special count on the contract itself, the parties to the contract must be the parties to the suit, and be controlled by its provisions.

Again, the defendants seem to misapprehend the rule in another respect, for when work is done under a contract, the suit must be between the parties to it; and third persons, though benefited by the work, cannot be sued on an implied *assumpsit* to pay for that benefit, upon the idea that they cannot avail of the fact of the work being so done under a contract with others.

It is true, as a general proposition, that if the owner of real estate will stand by silently and allow another to go to work, and bestow his labor and materials for its benefit and improvement, that he ought to be liable upon an implied *assumpsit* to pay therefor a reasonable compensation. Yet this does not apply, when that labor and those materials were bestowed under an express agreement. This being so, the counsel for the defendants, and the court below, have fallen into an error as to the application of the principle. The plaintiff in error had a right to set up and show there was a special contract with other parties, under which the work was done, and therefore that there could be no implied undertaking on his part, in law, to pay, notwithstanding the work was beneficial to him, and he stood by without objecting to its being done on his premises. Recognizing, as we do, the validity of the special contract in any form of action to recover for this work, it follows, as a corollary, that in any form of action which may be deemed proper to recover upon it, the parties to it must become the parties on the record, and the amount of the recovery must be regulated by the provisions in the contract. Any other rule would make contracts of little value, and the courts might become instruments of oppression in attempting to enforce them. Sound and long-established rules must be adhered to. A general notion of administering equity in particular cases should not induce courts to overturn settled principles. They might do more wrong than they would redress in the particular case.

For the reasons given, the judgment of the court below is reversed.

Judgment reversed.

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LAW WILL NOT IMPLY CONTRACT where there is an express contract between the parties: *King v. Woodruff*, 60 Am. Dec. 625; nor will courts substitute another contract in place of one made by the parties: *Richardson v. Maine Ins. Co.*, 74 Id. 459.

RECOVERY ON QUANTUM MERUIT for work done under a contract: See *Gilman v. Hall*, 34 Am. Dec. 700; *Hunt v. Test*, 42 Id. 659; *Keldridge v. Rowe*, 43



Id. 41; *Blood v. Enos*, 38 Id. 363; *Gleason v. Smith*, 57 Id. 62; *Greene v. Linton*, 31 Id. 707; *Coe v. Smith*, 58 Id. 618; *Pizler v. Nichols*, 74 Id. 298; *Angle v. Hanna*, Id. 161; *Wolfe v. Howes*, 75 Id. 388.

WHEN PLAINTIFF CANNOT RECOVER ON QUANTUM MERUIT: *Winstead v. Reid*, 57 Am. Dec. 571.

FORM OF COUNT FOR QUANTUM MERUIT: *Allen v. Patterson*, 57 Am. Dec. 545, note; *Wolfe v. Howes*, 75 Id. 388.

THE PRINCIPAL CASE IS CITED to the point that an implied contract cannot arise where there is a subsisting express contract covering the entire subject-matter, in *Ford v. McVay*, 55 Ill. 122; *Foley v. Bushway*, 71 Id. 391; *Phelps v. Hubbard*, 59 Id. 81. It is cited to the point that where a contract has been performed, and nothing remains to be done under it but to pay the money due by its terms, the party to whom it is owing may sue in *assumpsit*, and recover under the appropriate common counts, and is not required to declare especially on the written instrument, in *Thomas v. Caldwell*, 50 Id. 141; and is cited to the point that where work is done under a special contract, the suit must be between the parties to the contract, and that third persons, though benefited by the work done, cannot be sued upon an implied *assumpsit*, in *Compton v. Payne*, 69 Id. 355.

## LOY v. STEAMBOAT F. X. AUBURY.

[28 ILLINOIS, 412.]

**ACTION OF TRESPASS WILL LIE AGAINST STEAMBOAT, UNDER ILLINOIS STATUTE, for an assault and battery committed by the mate or other officer of the boat, on the person of a passenger on board, while such boat is navigating the rivers within or bordering upon the state.**

THE facts are stated in the opinion.

*E. F. Bull*, for plaintiff in error.

*B. C. Cook*, for defendant in error.

By Court, BREESE, J. This was an action of trespass, brought by plaintiff in error in the La Salle circuit court, against the steamboat F. X. Aubury, for an assault and battery, committed by the mate of the boat upon the plaintiff, while he was a passenger upon the boat, whereby the plaintiff's thigh was broken. It is averred in the declaration that the F. X. Aubury was a steamboat navigating the navigable rivers in and bordering upon this state. The general issue was pleaded; a trial by jury, and damages assessed for plaintiff at two thousand dollars.

The court refused to render judgment on the verdict, but arrested the same, and this is assigned for error.

The grounds upon which the court arrested the judgment do not appear in the record.

The action was brought under the act of February 16, 1857, the title of which is, "An act to amend chapter 102, Revised Statutes, entitled 'Steamboats.'" The first section is as follows:

"That steamboats and other water craft navigating the rivers within and bordering upon this state, shall be liable for debts contracted on account thereof by the master, owner, steward, consignee, or agent, for materials, supplies, or labor in building, repairing, furnishing, or equipping the same, or due for wharfage, and also for damage arising out of any contract for the transportation of goods or persons, or for injuries done to persons or property by such craft, or for any damage or injury done by the captain or mate or other officer thereof, or by any person under the order or sanction of either of them to any person who may be a passenger or hand on such steamboat or other water craft at the time of the infliction of such damage or injury: Provided that nothing herein contained shall be construed to make the craft or owners thereof liable for the trespass done by any of the crew not under the direction of the officers in command thereof": Scates's Comp. 789.

The record presents the question, Can an action of trespass be maintained against a steamboat for an assault and battery committed by the mate of the boat on the person of a passenger on board, whilst such boat is navigating the rivers within or bordering upon this state?

It is a case of the first impression, and its decision must depend upon the construction proper to be placed upon the statute cited.

In arriving at this, we must consider what were the mischiefs sought to be remedied by this enactment. It was well known that steamboats plying upon the rivers in this state or on its borders, a great majority of them at least, were the property of persons not residing in this state, and whose actual and permanent residence, if they had any, not easy to be ascertained, and their names not unfrequently unknown, and difficult, if not impracticable, to make them amenable to the process of our courts. It often happens, too, that the owner was not pecuniarily responsible; and it was notorious, and is yet, that they employed in responsible positions on their boats unreliable persons, men of low, rough, and brutal character, who, when clothed with "a little brief authority," would be domineering, tyrannical, and cruel towards those temporarily in their power, and withal wholly irresponsible in every re-

spect, and against whom, should an action be brought for an injury, no matter how flagrant, no redress whatever could be had. These were among the mischiefs which the legislature designed to remedy, and the mode by which it was to be accomplished was, by substituting the boat itself in the place of the owners or officers controlling it, and making it liable directly, not only for its contracts, but for its torts, and sell her out to satisfy the judgment.

Admitting this, the question is made, What shall be the kind of action for an injury done to a passenger by the captain, mate, or other officer? The statute provides no form, and the defendant insists, as it is in derogation of common law, and no personal service required, it should be strictly construed. That the common law would only allow an action on the case, as the injury to the plaintiff is, so far as the boat and its owners are concerned, consequential only, resulting wholly from their wrongful act in employing a man unfitted for his station.

The answer to the question here made is obvious, if the view we have taken of the purposes of the act be correct. The boat is treated as a person, and whatever action would lie against a person, for an injury, will lie against the boat, the kind of action to be determined by the nature of the injury, and the damages recoverable will be such as are legally recoverable in the action brought, to be determined by the evidence. If punitive damages may be recovered in an action of trespass against a person, we see no reason why they may not be against a boat treated as a person, as an admonition to its owners to put none in authority upon it but responsible persons,—men who will exercise proper care, and have due respect for the rights of those committed to their charge.

The facts appearing in the record show an outrageous case of assault and battery by the mate, and we know of no action but trespass that will fit such a case. The legislature evidently intended to give such action as would fit each case of injury as it should arise. If the injury was by force,—direct, wanton, willful, and malicious,—trespass would be the remedy. If the injury was not the direct and necessary consequence of the force, or was the result of carelessness or negligence, then case would be the remedy.

We know of no other state having a statute like this but the state of Ohio. The section we have quoted is almost an exact copy of the first section of the law of Ohio, the word

“waters” being found in that, while “rivers” is the term used in ours. With that difference they are substantially the same.

The law of Ohio has undergone judicial consideration quite often. We have looked into the cases referred to, decided by the supreme court of that state; one of them, the case of the *Steamboat Champion v. Jantzen*, 16 Ohio, 91, seems to be directly on the point we have been discussing. The action was for assault and battery brought by Jantzen against the steamboat *Champion*, under the statute. Trial by jury and a verdict for plaintiff. The facts proved were that the boat was engaged in the New Orleans trade, and while on one of the voyages, the mate committed an assault and battery on the plaintiff at Hawesville, in the state of Kentucky, while the boat was coaling; and at another time while the boat was in the Mississippi River, at the city of Vicksburg, in the state of Mississippi, a second assault was committed while the plaintiff was doing his duty as fireman,—all of which occurred without the jurisdiction of the state of Ohio.

The evidence being closed, the counsel for the steamboat moved the court to instruct the jury that an injury inflicted by the mate of a steamboat upon a hand of the boat, cannot be given in evidence against the boat in an action under the statute, where the injury occurred without the jurisdiction and far from the limits of the state of Ohio. This instruction the court refused to give. Other instructions were asked having a similar bearing, which were refused. Refusing to give this instruction was assigned for error. It was not suggested by counsel or court that if the assault had been committed within the jurisdiction of the court, the action would not lie. That seems to have been conceded.

The supreme court say: “The decision of this case depends entirely upon the construction which shall be given to the act under which the original suit was brought. Without that act, no one would ever have thought of commencing an action of trespass for an assault and battery in a common-law court, against any water craft by name. But by the act referred to, this mode of proceeding seems to be authorized in some, if not in all cases. As we understand the statute, the intention of the general assembly was to render boats liable for the torts of its officers committed while such boats were upon our own waters, or upon waters bordering upon the state; in the case before the court, the trespasses complained of were committed entirely beyond the territory of this state, and not while the

boat was navigating the waters bordering upon, or within the state."

The implication here is very clear, that if the boat had been navigating the waters bordering upon or within the state of Ohio when the injury was committed, the action of trespass would lie.

In the case of *Canalboat Huron v. Simmons*, 11 Ohio, 458, the court say: "Our statute treats the boat as a person, and makes it responsible in its own name for all debts contracted for its use, and for all injuries committed against persons or property on board by her officers or crew. The statute is equitable in its object, making it the interest of owners to intrust their boats only to responsible officers and crews, and will receive a liberal construction to carry the design of its enactment into effect."

It is very clear, we think, that our statute was designed to place the boat itself in the place of the officers who shall commit the injury, and giving to the party injured his election, to proceed against the offender, as at common law, or against the boat, without intending, in either case, to change the form of action. Trespass would lie against the officer, and as the boat is substituted for him, it must lie against the boat.

We have decided, on common-law principles, that an action of trespass would lie against a railroad corporation for a tort committed by one of its employees to a passenger on its train: *St. Louis, A., & Ch. R. R. Co. v. Dalby*, 19 Ill. 363. Fortified by this statute, the case of the plaintiff is beyond controversy.

The judgment of the court below is reversed, and the cause remanded, with directions to enter a judgment in favor of the plaintiff, upon the verdict of the jury.

Judgment reversed.

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## HERRING v. WOODHULL.

[29 ILLINOIS, 92.]

INDORSEMENT MAY BE MADE ON FACE OF BILL OR NOTE; and any form is sufficient which manifests an intention to transfer it.

INDORSEMENT IN FORM OF GUARANTY TRANSFERS TITLE IN NOTE TO HOLDER as an indorsee.

TRANSFER OF NOTE CARRIES WITH IT MORTGAGE GIVEN TO SECURE IT.

INDORSEMENT OF NOTE AND MORTGAGE TO TWO INDORSEES entitles each to one half the note and its proceeds and to one half the mortgage security, and neither can transfer any other or greater interest therein.

**AVERMENT IN BILL THAT ONE OF TWO JOINT OWNERS OF NOTE AND MORTGAGE** was authorized by his co-owner to make an assignment thereof to complainant will be taken as confessed where such co-owners are summoned in the suit by publication and make default.

**DECREE OF FORECLOSURE OF NOTE AND MORTGAGE BEARING TEN PER CENT INTEREST**, where the legal rate is but six, must be for the principal and six per cent only, and interest paid over six per cent must be credited.

BILL for foreclosure, filed by Woodhull against Herring and others averring that Herring, being indebted to one Benjamin Moffatt, made his promissory note therefor, with interest at ten per cent per annum, and to secure the payment of the note, Herring executed to Benjamin Moffatt a mortgage of a certain tract of land. Benjamin Moffatt assigned the note and mortgage to Daniel C. Moffatt and Hezekiah H. Moffatt by a guaranty written on the face of the note and by an instrument in writing under seal. Afterwards, Daniel C. Moffatt, being duly authorized by Hezekiah H. Moffatt, assigned in writing the note and mortgage to the complainant Woodhull. Herring answered, setting up that the consideration of the note and mortgage was the purchase price of land, and that therefore the note was usurious as to all interest above six per cent. He alleged that he had paid a large amount as interest, and insisted that this amount should be applied toward the discharge of the principal and lawful interest. Daniel C. and Hezekiah H. Moffatt were made defendants, among others, and notice to them was duly published. A decree was entered stating that the bill was taken for confessed against the defendants other than Herring; that Herring made the promissory note; that Woodhull is the *bona fide* holder and indorsee thereof, and assignee of the mortgage; that the same are now due and unpaid, and that a certain sum is due thereon, and decrees that Herring pay such sum to Woodhull, or that the premises be sold. On appeal, it was assigned as error that the decree declares Woodhull to be the indorsee of the note, when in fact it was not negotiable, and was not indorsed to him; that no valid assignment of more than a moiety of the note and mortgage to Woodhull was shown; that the amount found due included interest computed at ten per cent instead of at six.

*Burnap and Harvey*, for the appellants.

*J. M. Wight*, for the appellee.

By Court, BREESE, J. The first point made in this case is, that the note was not properly indorsed, the transfer being on the face of the note. Literally, indorsement means a writing, in

dorse, upon the back of the bill or note. But it is well established that, though such is its import, it may be made on the face of the bill, and numerous indorsements may be made on a separate paper called an *allonge*: Chitty on Bills, 227; *Yarborough v. Bank of England*, 16 East, 12; *Rex v. Bigg*, 1 Stra. 18; Story on Promissory Notes, sec. 121; *Gibson v. Powell*, 6 How. (Miss.) 60. And any form is sufficient which manifests an intention to transfer the note: *Moies v. Bird*, 11 Mass. 436 [6 Am. Dec. 179].

This indorsement is in the form of a guaranty, and is sufficient to convey and transfer the title in the note to the holder as an indorsement: *Heaton v. Hulbert*, 3 Scam. 489; *Partridge v. Davis*, 20 Vt. 499. This principle is well established.

We do not suppose there was any necessity for assigning the mortgage. When the note was indorsed, that carried with it the mortgage, the note being the principal debt, and the mortgage but an incident: *Lucas v. Harris*, 20 Ill. 165. By the indorsement of the note and mortgage by Benjamin Moffatt to Daniel C. and Hezekiah H. Moffatt, they became entitled each to one half the note and its proceeds, and to one half the mortgage security, and no more; and neither one could transfer any other or greater interest in the same.

The bill filed by appellee claimed the whole interest by virtue of the assignment of Daniel C. Moffatt to him, and the decree passed to that extent, declaring the appellee the owner of the whole mortgage, and of the moneys that should arise from the sale of the mortgaged premises.

He insists here, as there was a charge in the bill that Hezekiah H. Moffatt had authorized Daniel C. Moffatt to assign the mortgage and deliver the note and mortgage to appellant, and as that charge was not denied by H. H. Moffatt, it must be taken for true, and must bind him. There was no actual notice to either of the Moffatts, by summons, of the pendency of the bill, but a publication only, and on their non-appearance, their default was entered, and the matters in the bill taken as confessed. We should think, as notice by publication is by law a sufficient notice, the parties so notified must be deemed to be in court, and subject to any legal decree or judgment of the court, and that H. H. Moffatt, by his default, is precluded from denying the fact of the assignment of the mortgage, and of his interest in it.

The appellant sets up, as a part of his defense, that the note was for a usurious consideration, and submits proof that the



note was given for the purchase price of a tract of land, and for nothing else, and that ten per cent interest was reserved thereon.

This note was made in 1854, while the first three sections of the act of 1849, regulating interest, were in force. By those sections but six per cent interest could be reserved on such a contract. The appellant shows that he has paid a large portion of interest computed at ten per cent per annum. This he may avoid, and the decree for more than six per cent per annum is erroneous. The bill and exhibits and testimony will be referred to the master in chancery, to take an account of interest paid over and above six per centum per annum, and the interest calculated at six per centum per annum, and no more, which, with the principal sum added, will be the amount of the sum which the circuit court of Winnebago County will render in the cause. The costs of this court to be equally divided between the parties.

Decree modified.

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ASSIGNMENT OF DEBT CARRIES WITH IT MORTGAGE: *Perkins v. Sterne*, 76 Am. Dec. 72, note 76. The principal case is cited to this effect in *Cushman v. Stone*, 69 Ill. 519.

USURIOUS CONTRACT, RECOVERY OF PRINCIPAL AND INTEREST ON: *Philadelphia etc. R. R. Co. v. Lewis*, 75 Am. Dec. 574, note 577. Excess of interest paid beyond legal rate may be credited: See *Lockwood v. Mitchell*, 70 Am. Dec. 78.

INDORSEMENT MUST BE MADE ON INSTRUMENT ASSIGNED or on some paper accompanying it at the time the bill passes: *Buckner v. Real Estate Bank*, 41 Am. Dec. 105.

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## CLAUSER v. STONE.

[29 ILLINOIS, 114.]

RULE THAT OBJECTIONS TO EVIDENCE MUST BE SPECIFIC APPLIES ONLY TO SUCH OBJECTIONS as can be obviated by other evidence, or by the act of the party or the court.

WORDS "WITH EXCHANGE" IN NOTE ARE UNMEANING, AND MAY BE REJECTED as surplusage, and therefore do not affect the note in any way.

ASSUMPSIT on a promissory note by Stone against Clauser and another, the makers thereof. The defendants objected to the admission of the note in evidence, and the objection being overruled, excepted. Judgment for the plaintiff; motion for new trial overruled, and appeal. The opinion states the case.

*B. S. Prettyman and N. W. Green*, for the appellants.

*James Roberts*, for the appellee.

By Court, BREESE, J. The general rule is, unquestionably, as stated by the appellee's counsel, that objections on the trial, to a paper or other evidence, must be specially pointed out, so that they may be obviated, if possible. But this rule applies only to cases where the objection can be removed by evidence, or by the act of the party under the sanction of the court, or by the action of the court itself: *Jackson v. Van Schaick*, 5 Cow. 123; *Harmon v. Thornton*, 2 Scam. 355.

The bill of exceptions in the case shows the note declared on was made payable to the order of B. L. Merrill & Co., and indorsed: "Pay C. A. Rupert & Co., or order, for collection." The suit is brought by George H. Stone, and in his name, and on his own showing, the note was the property of Rupert & Co. It would hardly be allowed on the trial that Rupert & Co. should indorse the note to the plaintiff. That would not obviate the difficulty, for the plaintiff must show he had title to the note at the time the suit was brought. This, then, was an objection which could not have been obviated, if specifically pointed out. The cases of *Porter v. Cushman*, 19 Ill. 572, *Moore v. Maple*, 25 Id. 343, and *Dix v. Mer. Ins. Co.*, 22 Id. 272, do not materially differ from this in principle.

As to the objection that the note is not a promissory note under our statute, or by the law merchant, because it is payable "with exchange," and therefore like the case of *Lowe v. Bliss*, 24 Id. 168 [76 Am. Dec. 742]. In that case, the note was payable "with current exchange on New York"—in this, simply "with exchange," which are unmeaning, and can be rejected as surplusage. They certainly do not make the note void.

The judgment is reversed, and the cause remanded.

Judgment reversed.

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PROMISE TO PAY SUM CERTAIN "WITH CURRENT RATE OF EXCHANGE," IS NOT PROMISSORY NOTE: *Lowe v. Bliss*, 76 Am. Dec. 742, and note 746, cited and distinguished in the principal case.

EVIDENCE MUST BE OBJECTED TO WHEN OFFERED: *Gillespie v. Smith*, *post*, p. 328; *Bell v. Byerson*, 77 Am. Dec. 142; *Green v. Hamilton*, Id. 295, note 302; *Iaeger v. Bossieux*, 76 Id. 189, note 202; *Monk v. Horne*, 75 Id. 94, note 96. Objection to evidence on a specific ground, which might have been obviated had the objection been made in the lower court, cannot be raised for the first time in the appellate court: *Monk v. Horne*, *supra*. But though the failure to object to the introduction of a written instrument in evidence is an

admission that the instrument is evidence, it is not an admission that it is sufficient evidence to sustain a judgment: *Lowe v. Bliss*, 76 Id. 472; *Gillespie v. Smith*, *post*, p. 328. The general rule is, however, that the grounds of objection should be stated: *Rindskoff v. Malone*, 74 Id. 367, note 368.

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## MOORE v. DUNNING.

[29 ILLINOIS, 120.]

**DESERTION BY HUSBAND, LEAVING HIS FAMILY STILL OCCUPYING HOMESTEAD,** is not an abandonment of the homestead. It still continues to be the home and residence of the husband as well as of his family, at least until it is proved that he has acquired a residence elsewhere.

**EJECTMENT** by Dunning against Moore. The plaintiff claimed under a sale under a trust deed made by the defendant and wife. The defendant claimed the property as a homestead. Verdict and judgment for the plaintiff, motion for new trial overruled, and appeal.

*Glover, Cook, and Campbell*, for the appellant.

*J. M. Wight*, for the appellee.

By Court, CATON, C. J. This trust deed was not acknowledged, as required by the statute, in order to release the homestead. Consequently, if it still continued to be the homestead of the family, it remained unaffected by that deed, even if the deed could take effect after that, which is a point we do not now decide. The only question therefore is, whether the desertion by the husband, leaving his family still occupying the homestead, was an abandonment of it as a homestead. To this there can be but one answer, which is in the negative. This place still continued the home and residence of the husband, as well as his family, at least until it is proved that he had acquired a home and a settlement elsewhere, and this the law can never assume he has done. The presumption is that he continues a wanderer, without a home, until he returns to his duty and his family.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

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**ABANDONMENT OF HOMESTEAD, WHAT CONSTITUTES:** See *Tumlinson v. Swinney*, 76 Am. Dec. 432, and note 439; *Guiod v. Guiod*, Id. 441; note to *Taylor v. Hargous*, 60 Id. 607-615. Desertion of the family by the husband, still leaving his family occupying the homestead, is not an abandonment of the homestead: *White v. Clark*, 36 Ill. 289; *Buck v. Conlogue*, 49 Id. 394; *Blandy v. Asher*, 72 Mo. 35; *In re Pratt*, 1 Flipp. 355, citing the principal case.

## FITZGIBBON v. LAKE.

[29 ILLINOIS, 165.]

**RECORD OF GUARDIAN'S SALE IS ADMISSIBLE IN DEFENSE TO EJECTMENT** in behalf of one claiming under such sale, if the court ordering the sale had jurisdiction to make the order.

**TO GIVE COURT JURISDICTION TO DECREE GUARDIAN'S SALE**, enough must appear either in the application or the order or somewhere on the face of the proceedings to call upon the court to proceed to act.

**MINORS NEED NOT BE MADE PARTIES TO PROCEEDING BY THEIR GUARDIAN** to procure an order of sale of their property, as the application is for their benefit.

**WHETHER ONE OF TWO GUARDIANS NAMED IN WILL HAS AUTHORITY TO INSTITUTE PROCEEDINGS** for sale of ward's property is for the court to determine upon the hearing of the petition, and is not the subject of collateral inquiry.

**WHETHER GUARDIAN'S SALE IS IN COMPLIANCE WITH ORDER** is for the court to determine upon confirmation of the sale, and is not the subject of collateral inquiry.

**ORDER DISMISSING PROCEEDING ENTERED BY MISTAKE AFTER DECREE** and before confirmation of guardian's sale will not vacate the order of sale or revoke the authority of the guardian to sell.

**PURCHASER OF LAND AT GUARDIAN'S SALE IS NOT RESPONSIBLE FOR ERRORS OF COURT** in directing the application of the proceeds thereof.

**EJECTMENT.** The plaintiffs claimed as devisees of Patrick Fitzgibbon, deceased. The defendants claimed under a guardian's sale of the land as the property of the plaintiffs, who were his wards at the time of the sale. To the introduction of the record of the guardian's sale, the plaintiffs objected. The court found for the defendants. Motion for a new trial was overruled, and the plaintiffs excepted.

*Van Buren and Gary*, for the plaintiffs in error.

*Hosmer and Peck, and Waite and Towne*, for the defendants in error.

By Court, CATON, C. J. The whole of this case depends upon the admissibility of the record of the guardian's sale. That was the record of a court authorized by our law to order sales by guardians of the estates of infants for their support or for reinvestment. This record is offered in defense of an action of ejectment by one claiming under the guardian's sale. It really seems difficult for even good lawyers to appreciate the difference between such a case and a direct proceeding upon such a record for the purpose of reversing the order of the court, although almost every volume of our reports might teach them the difference. In a collateral action like this,

such a decree, let it be never so erroneous, is just as valid and binding as if it were regular in every particular, if the court had jurisdiction to render it. This question of jurisdiction is the only one which can now be inquired into. What, then, will give the court jurisdiction? This question we have often answered. We will quote the answer given in *Young v. Lorain*, 11 Ill. 637 [52 Am. Dec. 463]: "They all agree that enough must appear either in the application or the order, or at least somewhere on the face of the proceeding, to call upon the court to proceed to act; and all agree that when that does appear, then the court has properly acquired jurisdiction; or in other words, is properly set to work."

Now, this petition contains all that the statute requires to authorize the court to order a sale of the minors' estate for their support. It states that the petitioner is testamentary guardian of these minors, naming them; that he has faithfully applied all the personal property belonging to the estate, and that he has not personal estate sufficient in his hands for their education and support; that the minors have real estate, describing it, which he asks to have sold, and the proceeds applied to their support and education. The first objection is, that the minors were not parties to the proceeding. This was not necessary, as the application was for their benefit: *Mason v. Wait*, 4 Scam. 127; and this case was approved and followed in several cases at the last term, not yet reported: See *Stow v. Kimball*, 28 Ill. 93. The next is, that the petitioner could not alone, without joining the other guardian named in the will, properly institute that proceeding. Whether the petitioner was the guardian, and had authority to institute the proceeding, was for that court to determine when it heard the petition. It decided he was, by granting the order, and we cannot reverse that decision here. Again, it is said that the sale was not in compliance with the order of the court. That was for that court to determine when it approved of the sale. We cannot inquire into any such irregularity. Again, it is said the proceeding was dismissed before the sale was approved. After the decree, and before the report of the sale by the guardian, by mistake an order was entered, purporting to dismiss the proceeding. That did not vacate the order of sale, nor revoke the authority of the guardian to sell, and to report the sale to the court; and when such report was made, it was the duty of the court to act upon it. This was done, and the sale approved. Although the court formally vacated the order

entered dismissing the proceeding, yet this was not necessary. The last objection is, that the lands of two of the minors could not be applied, in whole or in part, to the support of the other. It was not for the court to inquire in this case what was done with the money. If the court erred in directing an improper application of the money, the purchaser was not responsible for that. It was sufficient for him to see that there was an order for the sale of the land made by a court which had jurisdiction to make the order. Such was undoubtedly the case, and the judgment must be affirmed.

Judgment affirmed.

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WHEN JURISDICTIONAL FACTS APPEAR IN RECORD OF PROBATE COURT, DECREE CANNOT BE COLLATERALLY ATTACKED: *Root v. McFerrin*, 75 Am. Dec. 49, and note 61; *Monk v. Horne*, Id. 94; *Stuart v. Allen*, 76 Id. 551; *Singerly v. Swain*, 75 Id. 581; *Kimball v. Fisk*, Id. 213, note 219. If the probate court acquired jurisdiction, mere irregularities in its proceedings do not invalidate them: *Kimball v. Fisk*, *supra*; and whether courts of probate are courts of general or limited jurisdiction, see Id.; *Overseers of the Poor v. Gullifer*, 77 Id. 265, and cases cited in the note 266. The judgments and decrees of courts having jurisdiction of the parties and subject-matter cannot be collaterally impeached: *Boston etc. R. R. Corp. v. Sparhawk*, 79 Id. 750, and note; *Lipscomb v. Postell*, 77 Id. 651; *March v. Eastern R. R. Co.*, Id. 732; *Wallace v. Brown*, 76 Id. 421; *Rape v. Heaton*, Id. 269. The principal case is cited to the point that when the jurisdiction of the court over parties and subject-matter is shown by the record, the decree or order of court cannot be collaterally attacked: *Richards v. People*, 81 Ill. 554; *Chicago etc. R. R. Co. v. Chamberlain*, 84 Id. 343; *Searle v. Galbraith*, 73 Id. 271; *Bostwick v. Skinner*, 80 Id. 154. "When the validity of acts done under a judicial proceeding is collaterally called in question, we have to look only to the jurisdiction, and if that is found to have existed, then it matters not how erroneous the proceedings of the court may have been, the rights of third persons acquired while such proceedings were unreversed, and by virtue of them must be protected:" *Goudy v. Hall*, 36 Id. 319; *Feaster v. Fleming*, 56 Id. 460, citing the principal case.

FACTS GIVING JURISDICTION TO ORDER GUARDIAN'S SALE must appear somewhere on the record: *Young v. Lorain*, 52 Am. Dec. 463.

EFFECT AND NECESSITY OF CONFIRMATION OF PROBATE SALE: See *Hutton v. Williams*, 76 Am. Dec. 297, and note 307; *Monk v. Horne*, 75 Id. 94, and note 98; note to *Burns v. Hamilton's Adm'r*, 70 Id. 579; *Penn v. Heisey*, 68 Id. 597.

WHETHER WARDS MUST BE MADE PARTIES TO PROCEEDING BY GUARDIAN to obtain order of sale of ward's property, see *Moore v. Hood*, 70 Am. Dec. 210, holding the affirmative.

PURCHASER FROM EXECUTOR NEED NOT LOOK TO APPLICATION OF PURCHASE-MONEY as a general rule: *Bond v. Zeigler*, 44 Am. Dec. 656. The principal case is cited to the point that a purchaser at a guardian's sale is not responsible for the order of the court in appropriating the money realized from the sale: *Mulford v. Stalzenback*, 46 Ill. 310.

## PERKINS v. CONANT.

[29 ILLINOIS, 184.]

**MORTGAGOR CANNOT MAINTAIN ACTION TO RECOVER USURIOUS INTEREST,** collected by sale of mortgaged premises under power of sale contained in mortgage deed; and the fact that the execution of the power was against the wishes of the debtor at the time does not aid him.

CASE for money had and received. Judgment for defendant, and plaintiff's motion for a new trial overruled.

*J. H. Mayborne*, for the plaintiff in error.

*Plato and Smith*, for the defendant in error.

By Court, WALKER, J. This record presents the question, whether the mortgagor may maintain an action to recover back usurious interest, collected by a sale of the mortgaged premises, under a power of sale contained in the mortgage deed. It appears that \$140 of usury was inserted in the note, which, with ten per cent interest thereon for two years, would amount to the sum of \$168 of usury received by defendant in error. Something more than two years after the maturity of the note the mortgagee proceeded to sell the land, had it bid off by Acres, conveyed it to him, and then received from him a reconveyance of the premises from Acres to himself. Whether defendant in error strictly pursued his power in making the sale so as to pass the title, is a question not now before the court. Whether he, as a trustee, could become a purchaser at a sale of the trust property, by employing an agent to bid it in, and whether a purchaser from him, if he had no such power, would take the title, are questions not now necessary to be determined.

In the case of *Haddin v. Innis*, 24 Ill. 381, the majority of the court held that usurious interest cannot be recovered back after it has been paid, nor set off against a different demand from that upon which the usurious interest was paid. This is regarded as the settled doctrine of the court. The question is then presented whether the same rule applies to involuntary payments or forced collection. If collected under a judgment or decree, there can be no question that the debtor would be estopped from recovering it back, his only means of avoiding the effect of his agreement for its payment being by a defense to a recovery on the debt upon which it had been paid. When it was collected in this case, it was by virtue of authority emanating directly from himself to make the sale



for the purpose. The sale having been made by authority from himself, it must be regarded as with his assent, and as his own voluntary act, as though he had made the sale in person and then paid the money. There was no coercion in executing the power authorizing the sale, and as it was permitted to be executed and carried out by a sale of the property, however much against the wishes of the debtor at the time, there can be no cause of recovery.

Some stress was placed upon the fact that plaintiff in error had made an effort to obtain an injunction to restrain the sale, which was refused by the master. And that he was prevented from applying to the judge of the circuit court for the purpose by his absence from home. There is nothing in the record from which it appears that he presented such a case as warranted the granting an injunction. But even if it did appear, a court of law is powerless to afford equitable relief.

The judgment of the court below must be affirmed.

Judgment affirmed.

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RECOVERY OF MONEY PAID AS USURY: See *Zeigler v. Scott*, 54 Am. Dec. 395, and note treating the subject 400-402; *Nichols v. Bellows*, Id. 85, and note 88. The principal case is cited to the point that usury paid cannot be recovered back: *Ramsay v. Perley*, 34 Ill. 508; and this rule applies to involuntary payments and forced collections: *Manny v. Stockton*, Id. 312. In *Carter v. Moss*, 39 Id. 545, 546, it is held, citing the principal case, that admitting that at common law, usurious interest can be recovered back, yet it cannot be recovered back under the Illinois statute of 1857; and that money collected upon collaterals must be considered as money voluntarily paid, and if usury is collected, it cannot be recovered back.

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## JENESON v. GARDEN.

[29 ILLINOIS, 199.]

**MONEY BORROWED OF THIRD PERSON AND INVESTED IN PURCHASE OF LAND**  
is not purchase-money within meaning of Illinois dower law.

BILL for foreclosure of mortgage by Garden against Jeneson and wife. It was alleged that the defendant, Jeneson, purchased the mortgaged premises for about four thousand dollars, and for the purpose of paying the purchase-money to his grantor borrowed of the complainant one thousand dollars and paid it to his grantor for that purpose alone; that Jeneson executed to the complainant his promissory note for the amount borrowed, and at the same time executed to him a

mortgage of the purchased premises to secure the payment thereof. A decree of foreclosure was rendered, debarring the wife of Jeneson from the right of dower.

*George Herbert*, for the plaintiffs in error.

*Snapp and Breckinridge*, for the defendant in error.

By Court, CATON, C. J. This was not purchase-money, within the meaning of our dower law. That means money due the vendor for land purchased on a credit, and does not mean money borrowed of a third person and invested in the purchase of the land. When sifted out, this is the only question there is in this case which requires notice. On the foreclosure of a mortgage given for such purchase-money as this, the decree bars the wife's dower. The meaning of the statute is so obvious that it requires no serious argument.

There might be a question whether the order entering the default of the defendants was equivalent to an order taking the bill as confessed, but as that is not again likely to arise in this or another suit, we pass it without consideration. The decree is reversed, and the suit remanded.

Decree reversed.

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DOWER IN LAND PURCHASED AND CONTEMPORANEOUSLY MORTGAGED BACK to secure the purchase-money: See *Malara v. Lepretre*, 56 Am. Dec. 266; *Smith v. Stanley*, 58 Id. 771.

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## MURPHY v. CHICAGO.

[29 ILLINOIS, 279.]

CITY IS NOT LIABLE FOR DAMAGES ARISING FROM EXERCISE OF ITS AUTHORITY in allowing a railroad track to be laid in a street, or in raising the grade of a street.

IT IS LEGITIMATE USE OF STREET OR HIGHWAY BY CITY to allow railroad track to be laid in it.

HABENDUM CLAUSE OF DEED CONVEYING LAND TO CITY FOR PURPOSES OF STREET, and none other, does not restrict city in the use of the street, but its power over such street will be the same as over any other; and it may raise the grade and permit a railroad track to be laid therein without becoming liable in damages.

CASE against the city of Chicago for an alleged breach of duty arising as claimed out of a contract between the parties. The plaintiff was the owner of land fronting on West Water Street, between Lake and Randolph streets. There had been conflicting claims of title between the property owners along

West Water Street and the city, which were compromised by mutual deeds between the parties, by which the city conveyed the site of the old West Water Street to the property owners, and the property owners conveyed to the city a site for a new West Water Street, the transaction having the effect to move West Water Street in a westerly direction the width of the street. In the plaintiff's conveyance of the portion of her lot to be taken for the new street, it was set forth that the city was to have and to hold the said premises as and for a public street or highway in said city, to be used as such and for no other use, object, or purpose whatsoever. The plaintiff erected upon the property thus acquired several valuable buildings abutting on the new street, the chief value of which consisted in the use of the new street by means of which access was had to Lake and Randolph streets, and there was no other means of access to the premises. The city afterwards passed an ordinance permitting certain railroad companies to lay and use railroad tracks upon the new West Water Street, and to tunnel Randolph and Lake streets, and to carry those streets over the railway and over West Water Street, and to use the same for an unlimited time. A railway company built its track on West Water Street, rendering the street impassable in so doing, and built walls and embankments twenty-three feet high on West Water Street at the intersections of Randolph and Lake streets. By reason of this, all access from Lake or Randolph Street to the new street, except down a long flight of stairs, was cut off, and the street, it was alleged, was effectually closed up for all purposes except those of the railroad company, and therefore the plaintiff's premises were made wholly untenable and largely diminished in value. demurrer to the declaration was sustained.

*Scates, McAllister, and Jewett*, for the plaintiff in error.

*B. F. Ayer*, for the city.

By Court, CATON, C. J. After all, the whole of this case is resolved into this simple inquiry, whether the common council has exceeded its legitimate authority in allowing the railroad track to be laid in Water Street, and in raising the grade of Randolph Street so as to pass over Water Street. If it has not, the law is too well settled to admit of dispute at this day that the city is not liable for damages resulting from the exercise of such lawful authority.

We have no doubt that the *habendum* clause of the deed, by

which the plaintiff conveyed a portion of Water Street to the city, for the purposes of a street, and none other, restricts the use of the premises to that of a street alone. But they have no right to use any of the other streets of the city for purposes other than those of streets. Their power over this is the same as over any other street—neither more nor less. Then the question recurs, What is the legitimate use of the street by the common council? That, too, is well settled. It is the settled law of this court, as well as in most of the other states of this Union, that it is a legitimate use of a street or highway to allow a railroad track to be laid down in it, and for doing so, the city is not liable for any damages which may accrue to individuals. Cases are constantly occurring where individuals are incommoded, and thus really damaged, in this way, for which the law can afford no remedy. Sometimes portions of a street are occupied by building materials, to the great inconvenience of a neighbor; but he must submit to it from necessity, and without compensation.

So, too, of the complaint that the grade of Randolph Street has been raised at the crossing of Water Street, so as to preclude passage from one to the other, except by a flight of stairs. The grade of streets is within the exclusive control of the common council, and the law is well settled that individuals who are discommoded thereby must submit, without compensation, to such improvements for the general good. The grade of the streets in a large portion of this very city has been so raised as to compel proprietors to raise their buildings, at a very great expense; but we have decided, following a rule well settled elsewhere, that the city may do this without compensation to the owners of property upon the street. It seems to us that all the principles involved in this case have been long and well settled, and we can have no difficulty in arriving at a satisfactory conclusion. Indeed, it is impossible to arrive at but one conclusion without overturning principles of law long settled and well established.

We must affirm the judgment.

Judgment affirmed.

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CITY IS NOT LIABLE FOR CONSEQUENTIAL DAMAGES accruing from the grading or improvement of streets: *Mayor etc. of Rome v. Omberg*, 73 Am. Dec. 748, and note 750; see also *City of St. Paul v. Seitz*, 74 Id. 753, and note 761, 762. The principal case is cited to the point that there can be no recovery by an adjacent property holder on streets, the fee whereof is in the city, for the merely consequential damages resulting from the character of the

they provide that the trustee shall not convey it to them until after partition, and then in severalty, or that he shall sell it and divide the proceeds among them; and dower cannot attach to property thus held.

**INCHOATE RIGHT OF DOWER ONCE VESTED IN WIFE** cannot be divested except by her own voluntary act performed in the mode prescribed by law.

**DAMAGES FOR NON-ASSIGNMENT OF DOWER** pursuant to demand are recoverable notwithstanding the refusal to assign was made in the utmost good faith under belief that the claimant was not entitled thereto.

**BILL** in equity filed by Frances B. Nicoll against Ogden and others setting forth that the defendants are seized of parcels of property in which complainant claims dower, her husband, Edward A. Nicoll, having been at one time seised of an equitable estate of inheritance in such property, and praying that her dower be set out to her. The tracts of land in which her deceased husband was alleged to have held an equitable estate of inheritance were called respectively, the "Trust half of the Hunter property," and the "Bard trust property." The facts with relation to the Hunter property are that in the latter part of 1834 several persons residents of New York, among whom was Nicoll, engaged in an adventure for the purchase and sale of Western lands. The real estate bought was conveyed to Charles Butler, and he sold it for the benefit of the adventurers. The interest of these persons was defined by certificates issued by Butler to them individually, dated July 1, 1835, which recited the purchase of the "Hunter property" in Chicago for one hundred thousand dollars, and that the adventure was divided into one thousand shares of one hundred dollars each, and stated the number of shares held by each adventure, and provided that the lands should be sold, and the net proceeds divided among the several parties in interest. They also stated that the interest of each adventurer was a personal interest in the proceeds of the sales, and not an interest in the land. The "Hunter property" was conveyed to Butler by deed absolute, though, in fact, in trust, September 8, 1835. Butler afterwards became the owner of an undivided one-half interest in the unsold portion of the Hunter property, holding the other half in trust as before mentioned. Circumstances made it desirable that the half-interest held in trust should be conveyed to other trustees, and Butler, at the request of the other parties in interest, conveyed an undivided one half of the unsold property to Nicoll and Bushnell April 1, 1842. At the time of this conveyance, the trusts upon which it was executed were not stated, but afterwards on April 12, 1842, Nicoll and Bushnell made and executed a declaration of trust. And these

trustees desiring a more specific declaration of their powers and duties as trustees, the parties interested in the adventure made and executed April 25, 1842, a declaration of the objects and intents of the trust. These instruments are set out in full in the opinion. Afterwards in the year 1842, Nicoll transferred his whole interest in the adventure to other persons. In January, 1843, the parties interested in that portion of the Hunter property conveyed by Butler to Nicoll and Bushnell agreed that partition should be made between Butler and the trustees, and a deed of partition was accordingly executed, and the portion of the Hunter property conveyed by Butler to the trustees is called the "Trust half of the Hunter property." By decree of court rendered August 6, 1845, Nicoll was removed from his trusteeship, and the powers theretofore vested in Nicoll and Bushnell jointly were declared to be vested in Bushnell alone. Afterwards all the parties at that time interested in the adventure sold and conveyed all their interest therein to the defendant, W. B. Ogden, and Bushnell conveyed to the same person all his title in the premises conveyed to Nicoll and himself. The appellant claims dower in certain lots of land, the title to which became vested in Ogden under these conveyances, and the defendants claim through the same conveyances. The cause was heard upon bill, answer, replication, and proofs, and the bill was dismissed *pro forma* from which decree the complainant appeals.

*Arrington and Peabody*, for the appellant.

*C. Beckwith*, for the appellees.

By Court, CATON, C. J. We shall first consider the claim to dower in the intestate's interest in the trust half of the Hunter property. This must depend upon the character of the title or right to that interest at the time of his conveyance of it, or at any time previous.

A few plain propositions may be stated, about which there is no dispute. In order to entitle the widow to dower in this property, the husband must, at some time during coverture, have been seised of an equitable estate of inheritance in the property. That is, an equitable title to this property must have presently existed in him, which title, had he died at the moment, would have descended to his heirs at law as real estate, instead of going to his personal representatives as a chattel interest or chose in action. Again, it is agreed on all hands, that while the title to the property remained in Butler,

the first trustee, the whole title to it as land, both legal and equitable, was in him, and the *cestuis que trust* had only a right to its avails or proceeds. During that time their right was a personal right,—it was personal property, and would not descend to their heirs. This was made so by the express agreement of the parties. They were partners in a speculating enterprise, and this property constituted their stock in trade; and in such a case there is no dispute that the character of personalty is stamped upon the property for the purpose of fixing the character of the interests of the several partners, although it was in truth real estate. Again, there is no dispute made that it was competent for the parties in interest, at any time they chose, to change the character of their interest in this property from that of a personal right to the proceeds of it to an equitable title to it. They could, in other words, divest this property of its artificial character of personal property, and change it back to its original and natural character of real estate. If this was done at any time, then the property became a hereditament; it was an estate of inheritance, and descended to the heir simply because it had become real estate and had ceased to be personal property. And if this was done, there is still the question to be considered, Was the equitable title to this property vested in the husband? Was he seised of this equitable estate, or did something remain to be done by him, or the *cestuis que trust*, or the trustee, or any one else, before this equitable title was vested in him, or to express it differently, before his right to it was complete? If the character of this property was so changed, and the title to it so vested in the *cestuis que trust*, it was done either by the conveyance from Butler to Bushnell and Nicoll, or in the declaration of trust which they made on the 12th of April, 1842, or by the specifications of the purposes of the trust made by the *cestuis que trust* on the 25th of the same month. Upon the true meaning and legal construction of these instruments, this branch of the case entirely depends. The first is a deed from Butler to Bushnell and Nicoll as joint tenants, and not as tenants in common, and describes them as trustees. With these exceptions it is an ordinary conveyance, without any specification of the trusts subject to which they were to hold the property. These were first stated by the trustees by the declaration of the 12th of April, 1842, twelve days after the date of the deed, and are in these words:—



"Whereas, Charles Butler, of the city of New York, has by deed dated April 1, 1842, duly executed by the said Charles Butler and Eliza A., his wife, conveyed to us, E. A. Nicoll and O. Bushnell, certain real estate, situate, lying, and being in the city of Chicago, that is to say, the undivided half-part of certain lots, pieces, and parcels of land, being the whole of the lots remaining unsold of the Hunter property so-called, reference being had to the said deed will more fully appear; and whereas, the said premises have been conveyed to us in trust for certain purposes, that is to say, we hold the same in trust for Edward A. Nicoll, who is entitled to six eighteenth parts thereof, the whole being divided into eighteen parts; Charles Butler, in trust for the assignees of Simeon Hyde, four eighteenth parts thereof; John S. Bussing, of the city of New York, two eighteenth parts thereof; Chester Clark, of the same place, two eighteenth parts thereof; Benjamin F. Butler, one eighteenth part thereof; William B. Ogden, one eighteenth part thereof; and Barton White, of White Plains, Dutchess County, two eighteenth parts thereof; and whenever partition shall be made of said premises among the said parties in interest, we shall and will convey to each of the persons before named, his heirs and assigns, or to such person or persons as he or they shall or may designate to receive the same, his part or share of said premises in severalty by deed with covenants of warranty against our own acts only; and partition thereof shall be made, if practicable, within six months from the date hereof; and if before the partition and conveyance of said premises, or any part thereof, as aforesaid, any of the same shall be sold, we shall and will account for the proceeds of said sales to the parties aforesaid, according to their respective rights and shares, first paying all the expenses, charges, taxes, assessments, etc., incident to the care and management of the said property and the execution of this trust; but it is not expected or required of us, the said trustees, that we, or either of us, shall go to Chicago for the purpose of effecting a partition of said premises; and it is understood and agreed that we are to be liable as trustees only, severally, and not jointly, for so much money as may come into our hands severally and respectively.

"Witness our hands and seals, this April 12, 1842.

"ED'D A. NICOLL. [SEAL.]

"ORSAMUS BUSHNELL." [SEAL.]

This first declares absolutely that they hold in trust for Nicoll, the husband of the petitioner, one third of the property, and in the same way naming the other *cestuis que trust*, and specifying the interests of each. Had this declaration stopped there, it would have left it as a simple and ordinary case of trust, in which two trustees hold the legal title to land for eight *cestuis que trust*, owning the equitable interests as tenants in common in different proportions, and upon them would have devolved the simple duty of performing the trust by the conveyance of the legal title to the *cestuis que trust*, either by one deed, specifying the interest of each, or by separate deeds to each, of his undivided portion. We say, had the declaration stopped there, such would have been the duties of the trustees and such the rights of the beneficiaries. But it did not stop there; it proceeded to impose other and additional duties upon the trustees. It further provides that whenever partition shall be made of the premises, they will deed in severalty to each the separate portion set off to him. Was this clause a limitation of the rights of the beneficiaries and of the duties of the trustees as to any of those rights and duties, and providing others in their stead, or was it an enlargement of those rights and duties, leaving those which existed without this clause still in force? The same inquiry may be made in reference to the next specification of duty, which is, that if any of the property shall be sold before partition, they, the trustees, will account for the proceeds to the respective parties in proportion to their respective rights. Here is an implied duty on the part of the trustees to convey the property thus sold to the purchasers, as well as to account for the proceeds. By whom were these sales to be made? Not by the trustees, for they had as yet no right to sell the property of their beneficiaries in this more than a trustee who holds a title to real estate in trust for another has a right to sell it without authority from the *cestuis que trust*. These sales, then, were to be made by the *cestuis que trust*, and in the event of such sales the trustees assumed the duty of receiving and distributing the proceeds. Now, did the assumption of these duties take away or limit the right of the *cestuis que trust* to have the property conveyed to them as tenants in common, should they at any time desire to have that done? Or did it relieve the trustees from the duty of so conveying at the election of the *cestuis que trust*? We think not. While the trustees might voluntarily assume new duties,

they could not throw off and relieve themselves from old ones. Such we understand to be the legal effect of this declaration of trust by the trustees.

On the 25th of April, 1842, the *cestuis que trust* made the following specification of the trusts assumed by the trustees:—

“Know all men by these presents, that whereas, Charles Butler, of the city of New York, counselor at law, and Eliza A., his wife, did, by an indenture bearing date the first day of April, in the year of our Lord one thousand eight hundred and forty-two, at the request of us, the undersigned, convey to Edward A. Nicoll and Orsamus Bushnell, of said city, the following pieces, parcels, and lots of land, that is to say.”

Then follows a description of the land, when the instrument proceeds:—

“Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, as by the said indenture will more fully appear, reference being thereunto had; to have and to hold the same to the said Edward A. Nicoll and Orsamus Bushnell, and the survivor, and the executors, administrators, and assigns of such survivor, upon the trust, however, expressed and declared in a certain declaration of trust, executed in writing, by the said Edward A. Nicoll and Orsamus Bushnell, and sealed with their seals, bearing date the eleventh day of April, 1842, as by reference to the said declaration of trust will more fully and at large appear.

“And whereas, a declaration of the objects and intents of said trust is desired and required of us by said trustees, with a view to express and define the powers of said trustees:—

“Now, therefore, these presents witness, and we the undersigned, *cestuis que trust* of the estate so granted to said Nicoll and Bushnell, as trustees, do hereby declare and agree to and with said Edward A. Nicoll and Orsamus Bushnell, that the objects and intents of said trust are as follows, viz.: That whenever partition shall be made of the said trust premises amicably by us, or by law, the said trustees shall and will convey to each of us in severalty, our heirs and assigns, or to such person or persons as we severally, or our several heirs or assigns, may designate, our several share of said trust premises, by deed with covenants of warranty against our own acts only, and partition thereof shall be made, if practical, within

six months from the date of said declaration of trust so made by said trustees; but it is not required or expected of said trustees, or either of them, that they will personally do anything to effect such partition, either amicably between us or by law; but only that they shall execute the conveyances in partition of our several shares to us, when required, after partition has been made by us or our authorized agent, or by legal proceedings, except that if legal proceedings become necessary, then the trustees shall use their names, and promote such partition in all proper ways. And further, that the said trustees may, before partition, sell and convey in due form of law the said trust premises, or any part thereof, to any person or persons, for such prices, and upon such terms of payment as they may deem fit and proper, and may delegate and appoint, by letter of attorney, all the above powers to William B. Ogden, of Chicago; or in case of his death, sickness, absence from Chicago, or refusal to act, to any other person or persons, without being responsible for any acts, receipts, or defaults of said attorney or attorneys, that may happen, without the willful default of the said trustees.

"They, the said trustees, accounting to us for all the proceeds of such sale or sales that shall come into their hands, in the proportions in which we are entitled to the same, first paying and retaining to themselves all the expenses, charges, taxes, assessments, etc., incident to the care and management of said trust property, and the execution of the said trust, incurred, made, paid, or sustained by them, the said trustees, or their attorney, and that the said trustees shall be liable only, severally and not jointly, for so much money as they may severally receive.

"In witness whereof, we have hereunto set our hands and seals, this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and forty-two.

"JOHN S. BUSSING. [SEAL.]

"EDWARD A. NICOLL. [SEAL.]

"W. B. OGDEN. [SEAL.]

"B. F. BUTLER. [SEAL.]

"CHARLES BUTLER. [SEAL.]

"CHESTER CLARK. [SEAL.]

"BARTON WHITE." [SEAL.]

This instrument teaches us that the deed from Butler to Bushnell and Nicoll was made at the request and direction of the beneficiaries; and that they sanction the declaration of

trust made by these trustees, which has been already quoted. It has importance on this account, while some material changes are made in the character of the trust itself and in the authority vested in the trustees. It declares the objects of the trust to be that whenever partition shall be made of the premises, the trustees shall convey to each in severalty, his heirs and assigns, or to such person as he or his heirs or assigns may appoint, his share in severalty. And further, this instrument expressly authorized the trustees to sell and convey the whole or any portion of the premises, and to appoint a substitute to exercise this last specified power, without being responsible for his default, but only for their own willful defaults. For the proceeds of such sales the trustees are required to account to the *cestuis que trust* severally, for their several proportions of the moneys thus received.

While this paper contains the same provision as to the duty of the trustees to convey to the parties in interest severally their respective proportions, on partition being made, the language is such as to indicate, to some extent at least, that they should not perform the trust till such partition should be made, except by sale of the lands and disposition of the proceeds. Was it, then, the intention of the *cestuis que trust* to place their equitable interests in this property beyond their reach or control, except in the particular mode here specified, that is, till partition should be made or till the property should be sold by the trustees and the money divided? Then, from that time forth the trust was executory, and they were not seised of the equitable title, that is, they were not in a position to require the performance of the trust, by the conveyance of the legal title to the *cestuis que trust*. They had no right to the *res* as it was. They had no right, collectively, to its proceeds in money even; but their rights became separate and individual, each one having an individual right to a conveyance of his separate portion of the land after partition, and a right to none of it till then, but a right only to his proportion of the proceeds of sales, made before partition. With this construction of this paper, this presents one of the best examples of an executory trust to be anywhere found in the books, except in cases arising on the construction of marriage settlements or wills. We have never before been called upon to examine particularly the distinction between trusts executed and trusts executory; able, logical, and perspicuous as they were. We confess our ideas on the subject were somewhat

confused. We have, with patient labor, investigated the subject. There is a well-settled distinction between what are called executed and executory trusts, founded, no doubt, to some extent upon artificial reasons, and as is usual when such is the case, not always of the most easy application. Its purpose and advantage is perhaps more generally to enable the courts to avoid the rule in Shelley's case, for the purpose of giving effect to a deviser, grantor, or donor. In one sense, all trusts are executory, or to be executed; that is, something has to be done to perform the trust, that the *cestui que trust* may enjoy the benefits of the trust to which he is entitled; as where one holds a legal title in trust for the benefit of another in whom is already vested the equitable title, with the right to be clothed with the legal title.

But where the beneficiary is not yet clothed with such an equitable title, but has a mere right to have some act done, which will vest in him such equitable title, then the trust is called executory, because of the necessity of the performance of this intermediate act. These might, perhaps, have been as well designated simple and compound trusts, or direct and remote trusts, or any other expression denoting the different degrees or gradations between the trustee and the *cestui que trust*. In the latter, the rights of the *cestui que trust* are less direct and immediate, and the powers, duties, and obligations of the trustee are ordinarily greater or more extended than in the former. Human affairs are so complex and variant, the objects of creating trusts may be so multifarious, and expressed in such variant terms, that there may be difficulty sometimes in assigning a particular trust to its proper class. In one case, this intermediate act may be so clearly expressed as to leave no doubt that an executory trust was intended, while in another it may be so contingent, discretionary, or so vaguely and doubtfully expressed as to make it difficult to say that it is not an executed trust. In such a case, the courts will give it whichever character will best subserve the apparent purposes of the creator of the trust. Now, if we assume that the *cestuis que trust*, by this last paper by them executed, intended to provide that the trustee should not convey the land to them in the condition it then was, but only after partition should be made, and then to them in severalty, or should sell it, and divide the proceeds among them, it became from that moment an executory trust, because there was something to be done before they were entitled to a conveyance. They had no vested

equitable title to the land, but they had a mere right to have something done which would give them an equitable title, or rather they had a right which, upon the performance of an act by themselves, or by the courts, would ripen into an equitable title, or into several equitable titles, to different portions; or if the trustees chose, they were authorized to sell the land, in which case others had rights severally to their respective portions of the purchase-money. If these were the only rights which these *cestuis que trust* had to or in this property, then we say this was an executory trust; and dower could not attach to the property thus held, and for the manifest reason that the husband had no title, either legal or equitable, to the land.

But we must now examine and see whether dower had not already attached to this land, before this specification of the trusts by the *cestuis que trust*. If it had so attached, this subsequent act of the husband could not divest it. It is a universal rule that when the inchoate right to dower is once vested in the wife, that right cannot be divested, except by her own voluntary act, performed in the mode prescribed by law. Let us return, then, to the first conveyance from Butler to Bushnell and Nicoll. Previous to that, we had already seen the subject of the trust was personal property, because the object of the trust was a partnership transaction or speculation.

At first, it did not appear that this conveyance was made with the approbation and instruction of the *cestuis que trust*, but for aught that did appear up to the 25th of April, 1842, twenty-five days after the deed was made, this conveyance may have come from the perverse motion of the trustee himself, in violation of his duty as trustee, and without the sanction of his constituents. Had such been the case, it may be that the new trustees would have taken it upon the same trust, and for the same purposes for which it was held by Butler. At least it would seem reasonable that, as the act was done without their consent, the beneficiaries might insist that the character of the property should not be thereby changed, although as the trust, as it existed in Butler, was accompanied by a special confidence reposed in his discretion, they ought not to be compelled to treat the property longer as personalty, and intrust the same responsibilities and powers in the new trustees. But it is not necessary to determine what would have been the effect of that conveyance upon the character of the property, which, although real estate in fact, was by the



parties and the law treated as personal property, had it been made without the knowledge and sanction of the *cestuis que trust*, for it now appears that it was done with their approval and by their direction. That conveyance, then, must have its full and legitimate influence in the determination of the question as to whether the property should still be considered personal property, or whether it was thereby reconverted into real estate. What, then, was the effect of that deed? What were the relations between the new trustees and the beneficiaries? What were the duties of the former, and the rights of the latter? This is the deed:—

“This indenture, made the first day of April, in the year of our Lord one thousand eight hundred and forty-two, between Charles Butler, of the city and county and state of New York, counselor at law, and Eliza A., his wife, of the first part, and Edward A. Nicoll and Orsamus Bushnell of the same place, trustees, of the second part: Witnesseth, that the said parties of the first part, for and in consideration of the sum of ten dollars, lawful money of the United States of America, to them in hand paid, by the said parties of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm unto the said parties of the second part, and to the survivors of them, and the heirs and assigns of such survivors forever, all and singular the following lots, pieces, and parcels of land situate, lying, and being in the city of Chicago, county of Cook, and state of Illinois, that is to say.”

Here follows a description of the property conveyed.

“Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any way appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, dower, and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances; to have and to hold the above granted and described premises, with the appurtenances, unto the said parties of the second part, as joint tenants and not as tenants in common, and to the survivor of them, and to the heirs and assigns of such survivors, to his and their own

proper use, benefit, and behoof forever. And the said Charles Butler, for himself, his heirs, executors, administrators, doth hereby covenant, promise, and agree to and with the said parties of the second part, trustees as aforesaid, and to the survivor of them, and the heirs and assigns of such survivor, that he hath not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, whereby or by means whereof the above mentioned and described premises, or any part or parcel thereof now are, or at any time hereafter shall or may be impeached, charged, or incumbered in any manner or way whatsoever.

“In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

“CHARLES BUTLER. [SEAL.]

“ELIZA A. BUTLER.” [SEAL.]

This, it will be seen, is a trust deed in the simplest form (if indeed it appears on its face to be a trust deed). The trust is not specified. There is no limitation or qualification to it. It is left entirely to the law to characterize it, or to say what are the duties of the trustees, and what are the rights of the *cestuis que trust*. They must necessarily be the same as they would be in any other simple trust, where one party holds the legal title to land in trust for another. If A conveys land to B in trust for C, that is simply a naked executed trust. There the duty at once arises in B to convey to C, which a court of chancery would at once enforce. Is it possible to distinguish such a case from the one before us? That is this case literally. Butler conveyed the legal title to these premises to Bushnell and Nicoll in joint tenancy, in trust for his *cestuis que trust*, without specifying what they shall do with it, or how long or for what purpose they shall hold it. And this was done by the direction of the *cestuis que trust*. Then it must have been their intention to leave this conveyance to the full operation and influence of the well-known principles of law. Had they designed otherwise—had they designed any special trust—that the trustees should assume any particular duties, or perform any particular functions, other than those raised or imposed by the law itself, upon such a conveyance, it was their duty, and they no doubt would have caused them to be inserted in the deed, or specified in a separate paper, executed at the same time with the deed, and so made to become a part of it. The deed itself could only be controlled by another paper, executed at the same time with it, so as to form a part of it. And

the separate papers executed subsequently on the 14th and the 25th of the same month can have no influence upon the construction or effect of this deed, nor upon the equitable estate thereby created, prior to their execution. They might, and no doubt did, change the character of the trust, but they could not have a retroactive effect, especially so as to effect in any way the rights of others not parties to them, vested or secured by that deed, or between the time of its execution and these subsequent declarations.

If by this deed the character of this property was reconverted from personalty to realty, if by it an executed trust was created, whereby an equitable estate of inheritance was vested in the *cestuis que trust*, during those twelve first days of April, 1842, then during that time the husband had an estate in the premises upon which the right of dower attached. If she would have been dowable of her husband's interest in these lands, had he died during these twelve days, then that right still continues, for she has done no act to divest herself of it, and as has been before said, that right of dower having once vested in the wife, it could not be divested, except by her own voluntary act performed in the mode specified by our statute. By the application of the most familiar principles of law to this deed, executed as it was by the direction of the *cestuis que trust*, we see no way of escaping the conclusion that they were thereby seised of the equitable estate in these lands. As the trust then stood, there was no act then to be done by the courts by themselves, by the trustees, or by any one else, to complete their equitable title. There was no partition provided for, there was no conveyance directed to be made to any one, there was no sale of the land, and distribution of the purchase-money directed or authorized, nothing remained to be done in order to vest the equitable title in them, and nothing remained to be done to unite in them the legal with the equitable title, but the simple conveyance of the legal title to them by the trustees. This was the only authority conferred upon or power vested in the trustees, and the only right created in the *cestuis que trust* by this deed. Here was nothing to characterize this as an executory trust, but every ingredient to mark it as an executed trust. If by this deed the equitable estate was not vested in the beneficiaries, it is not easy to conceive a case in which it would be. It cannot be said that there was the latent intent of the parties at the time the deed was executed, to give this trust the character into which

it was molded by those subsequent papers, for even those speak in the present tense, and do not profess to have a retro-active operation. If such latent intent was entertained when the deed was made, it was not then executed, nor till at least twelve days subsequently. That an equitable estate of inheritance was designed to be created by this deed, and continued under the declaration and specification of trusts dated the 12th and the 25th of April, there can be no dispute; both these papers, in express terms, declare that the trusts shall be performed to the heirs of the *cestuis que trust*. That it was the design of these papers that the right, title, interest, or claim whatever it was which the beneficiaries had in this property should descend to their heirs, instead of going to their personal representatives, is placed beyond all dispute by the express language of these papers. This, of itself, is sufficient to show a design to reconvert the property into real estate. In any aspect in which we can view this case, we think the complainant is entitled to have her dower assigned in one third of the trust half of the Hunter property.

If we are correct in our conclusions thus far, it necessarily follows that the complainant is entitled to dower in the interest which her husband owned in the Bard trust property. Indeed, if we lay out of view the papers executed on the 12th and the 25th of April, which we have, in fact, done, the cases are precisely alike. The only difference in the deeds is that, in the first, the word "trustees" is inserted after the names of the grantees, while it is not in the latter deed. But in legal effect, the deeds are precisely alike; whatever estate would be created in the *cestuis que trust* by the one, would also be created by the other. This last deed was also executed by direction of the beneficiaries, and by it, was created in the *cestuis que trust* an equitable estate of inheritance which, by our statute, is subject to dower.

Her right to dower in the country lands is not disputed.

The only remaining question is, whether the complainant is entitled to damages because her dower was not assigned, in pursuance of her demand, on the twenty-ninth day of January, 1859. Upon this point, no serious question has been or could be made. Although the defendant refused to assign dower in the utmost good faith, believing she was not entitled to it, yet the claim to damages is the same as if her right had been fully appreciated. She is undoubtedly entitled to damages for the delay, since the demand, as to all the prem-

ises in which it was his duty to assign dower, under that demand.

The decree must be reversed, and the suit remanded.

Decree reversed.

**EQUITABLE TITLE MAY BE COMPLETELY DIVESTED BY CLEAR AND UNAMBIGUOUS DECLARATION OF TRUST:** *Lane v. Ewing*, 77 Am. Dec. 632.

**PARTNERSHIP REALTY IS HELD BY TENANCY IN COMMON:** *Busfum v. Busfum*, 77 Am. Dec. 249; *Dillon v. Brown*, 71 Id. 700, and note 703, citing prior cases. When purchased and held for firm purposes, it partakes, however, of the character of personalty to the extent that it is under the control of chancery in making a final adjustment of the affairs of the partnership: *Mauck v. Mauck*, 54 Ill. 284, citing the principal case; *Andrews' Heirs v. Brown*, 56 Id. 252; *Lang's Heirs v. Waring*, 60 Id. 533; *Buchan v. Sumner*, 47 Id. 305.

**WIDOW IS NOT ENTITLED TO DOWER IN PARTNERSHIP REALTY** until settlement of partnership affairs, it being first liable to pay the debts of the firm: *Dyer v. Clark*, 39 Am. Dec. 697; *Sumner v. Hampson*, 32 Id. 722; *Andrews' Heirs v. Brown*, 56 Id. 252; *Markham v. Merrett*, 40 Id. 76.

**WIFE IS ENTITLED TO DOWER IN EQUITABLE ESTATE OF HUSBAND** capable of being specifically enforced in his lifetime: *Graham v. Graham*, 17 Am. Dec. 166; *Stevens v. Smith*, 20 Id. 205; *Porter v. Robinson*, 13 Id. 153. See, however, *Safford v. Safford*, 32 Id. 633; *Pledger v. Ellerbe*, 60 Id. 23. The principal case is cited to the point that widow is entitled to dower, where the husband held such an equitable estate as entitled him to be invested with the legal title: *Taylor v. Kearn*, 68 Ill. 347; *Stow v. Steel*, 45 Id. 331, 332; and to the point that to entitle a widow to dower in an equitable estate, it must have been such that in case of the husband's death, it would have descended to his heirs at law as real estate, instead of going to his personal representatives as a chattel interest, or chose in action: *Nicoll v. Todd*, 70 Id. 296.

**RIGHT OF DOWER CANNOT BE DIVESTED** without the consent of the widow expressed in the mode pointed out in the statute: *Walsh v. Reis*, 50 Ill. 479, citing the principal case. See *White v. White*, 31 Am. Dec. 232; *Leavitt v. Lamprey*, 23 Id. 685, note 687; *Carnall v. Wilson*, 76 Id. 351; but the remedy for the enforcement of the right may be barred under a statute of limitations: *Owen v. Peacock*, 38 Ill. 36, citing the principal case.

**THE PRINCIPAL CASE IS AFFIRMED** in *Nicoll v. Miller*, 37 Ill. 407, 412; *Nicoll v. Todd*, 70 Id. 296; *Nicoll v. Mason*, 49 Id. 360, 364.

## TROUT v. EMMONS.

[29 ILLINOIS, 432.]

**GENERAL AGENT CANNOT BIND PRINCIPAL BY SUBMISSION TO ARBITRATION**, without special authority to that effect.

**ANSWER IN CHANCERY IS TAKEN AS TRUE, IF NO REPLICATION IS FILED.** SWORN ANSWER IN CHANCERY MUST BE OVERCOME BY TESTIMONY OF TWO WITNESSES, or its equivalent.

**BILL** in equity praying injunction against a judgment. The bill alleges that complainant, Emmons, rented a farm of one

Bowman, as agent of the defendant, and had a difference with him about the rent for the year 1854. Emmons still continued to occupy the farm and pay the rent until 1857, when the defendant, Trout, commenced suit against him for the rent of 1854. Emmons and the agent Bowman agreed to submit the matter to arbitration; and the arbitrators decided that complainant was not indebted to defendant for the rent of 1854. The defendant recovered judgment against complainant in the suit instituted against him, at a special term of court, of which complainant knew nothing. The complainant alleged that he had a substantial defense to the suit, and appeared at a subsequent term, prepared to establish it, when he learned for the first time of the special term and the judgment rendered thereat. The defendant answered, among other things, that the complainant refused to pay the full amount of the rent for 1854 because he had not made a good crop; and that defendant had not authorized his agent to submit this or any other matters to arbitration. Decree making the injunction perpetual, and error assigned by the defendant.

*E. Beecher*, for the plaintiff in error.

*J. Baker*, for the defendant in error.

By Court, WALKER, J. This record presents the question whether a general agent may submit matters of his principal in dispute to arbitration, in the absence of special authority for that purpose. The trial was had on the bill, answer, and depositions. No replication was filed to the answer, and it must be taken as true. It denies the authority of the agent of plaintiff in error to submit the matter in dispute to arbitration, and the evidence only shows a general authority in the agent to receive the rents. A general agent has no authority to bind his principal to a submission to arbitration. To be binding, such a reference can only be made under a special authority: *Bacon v. Dubarry*, 1 *Ld. Raym.* 246; *Watson on Awards*, 50; *Scarborough v. Reynolds*, 12 *Ala.* 252. The evidence failing to show a special authority to refer the matter in dispute, and the authority being denied, the court below erred in enjoining the judgment.

The evidence of Bible is, that in a conversation between the parties, he heard plaintiff in error say he would leave the matter with Bowman, and any settlement which he should make would be satisfactory to him. This manifestly authorized Bowman to act as agent in making a settlement, and any

adjustment he might have made would have bound plaintiff in error. But from this statement it is impossible to infer a special authority to submit the matter to arbitration. It only authorized him to act in person, and not to call upon others, to make an adjustment. But if this were not so, plaintiff in error filed his sworn answer, and it must be taken as true, unless overcome by the evidence of two witnesses or its equivalent. Here there was the evidence of but one, which was not properly receivable to contradict the answer, to which no replication was filed.

The decree of the court below is reversed, and bill dismissed.

Decree reversed.

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ANSWER IN CHANCERY RESPONSIVE TO BILL IS TAKEN AS TRUE if no replication is filed: *McQueen v. Chouteau's Heirs*, 64 Am. Dec. 178; *Paul v. Carver*, Id. 649; until overcome by the testimony of two opposing witnesses or one such witness and corroborating circumstances: *Miles v. Miles*, 64 Id. 362. Where, however, the matter set up is new, or not responsive to the bill, it must be supported by proof: *Leach v. Fobes*, 71 Id. 732, note 734. In *Chambers v. Rowe*, 36 Ill. 173, it is said: "This court, in the case of *Trost v. Emmons*, 29 Id. 437, inadvertently intimated that where the answer was under oath, it might be overcome by the testimony of two witnesses, though no replication was filed. This was unadvisedly said, as the rule is differently settled. It is very clear, where the answer is not under oath, it is to be treated as pleading only, and without a replication the cause can be fully heard when set down for hearing on the bill, answer, exhibits, and depositions, and oral testimony heard in court, such answer having no more force as evidence than the bill."

AGENT CANNOT SUBMIT TO ARBITRATION an account which he is merely authorized to settle: *Huber v. Zimmerman*, 56 Am. Dec. 255.

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## GILLESPIE v. SMITH.

[29 ILLINOIS, 473.]

SIMILAR TO PLEA OF NOT GUILTY, OR TO ANY NEGATIVE PLEA, can be added by defendant, if he chooses to add it, and it is not error to proceed to trial without it.

SPECIFIC OBJECTIONS TO EVIDENCE MUST BE TAKEN IN LOWER COURT.

PARTY IS NOT PRECLUDED UNDER GENERAL OBJECTION TO EVIDENCE from showing in appellate court the insufficiency of the evidence, or from availing himself of radical defects in the instruments of evidence which could not be obviated by proof, and which strike at the foundation of the plaintiffs' claim.

DEED CONVEYING ABSOLUTE TITLE TO TRUSTEES ON DECLARED TRUST will not be construed as a mortgage, and there will be no equity of redemption from a sale thereunder.



**SALE OF LAND UNDER TRUST DEED WILL NOT BE SET ASIDE IN EQUITY,** because the property was not sold in separate parcels, except upon the ground of fraud, or that some one may have been prejudiced by the sale *en masse*.

**TRUSTEE UNDER TRUST DEED MAY EMPLOY AGENT TO PERFORM MECHANICAL PARTS** of sale, or to act as auctioneer, or to advertise and sell the trust lands. This is not a delegation of the trust.

**EJECTMENT** by appellees against appellant. Verdict for the plaintiffs. Motion for new trial overruled, and appeal. The opinion states the case.

*M. McConnel*, for the appellant.

*Smith and McClure*, for the appellees.

By Court, **BREESE, J.** The appellant assigns for error on this record, that the court erred in admitting as evidence each of the deeds and papers offered by the plaintiffs and objected to by the defendants; in overruling the defendant's motion for a new trial and refusing to set aside the verdict; in rendering a judgment in the cause, in manner and form as shown in the record; and further, in permitting the plaintiffs to call a jury, and proceeding to try the cause, when the defendants' plea of not guilty was not denied and issue joined.

It appears from the record, that three actions of ejectment were brought in the Morgan circuit court by the appellees against the appellant, for different tracts of land, of which the appellant admitted he was in possession, and on his motion and affidavit they were consolidated into one action, to which the appellant pleaded not guilty. A trial was had, and a verdict and judgment for the appellees. A motion for a new trial was entered, which was overruled, and a judgment rendered on the verdict for the appellees.

We do not think any one of the errors are well assigned. As to the last, taking them in reverse order, it ought to be considered, at this day, as a frivolous objection, unworthy of consideration. The *similiter* to a plea of not guilty, or to any negative plea, can be added by the defendant if he chooses to add it, and it is not error to proceed to trial without it: *Waters v. Simpson*, 2 Gilm. 577; *Williams v. Brunton*, 3 Id. 625; *Stumps v. Kelley*, 22 Ill. 140; *Walker v. Armour*, Id. 659.

As to the third error, the record shows this form of verdict, and the judgment thereon: The jury say that the defendant is guilty of unlawfully withholding from the plaintiffs the premises described in the plaintiffs' declaration (describing

them), and they further say that the plaintiffs are seised and entitled to hold the aforesaid premises as joint tenants in fee-simple, as the plaintiffs have, in their declaration, complained against the said defendant. The judgment is in strict conformity with this finding, and both are in full compliance with all the requirements of the statute. The premises are described in the verdict—the unlawful possession by the defendant found, and the estate specified, and the judgment of the court is, that the plaintiffs recover the possession of the premises according to the verdict of the jury, so that, “in manner and form,” the judgment was correctly rendered: Scates’s Comp. 217.

As to the second error assigned, the reasons for a new trial were: 1. That the court admitted as evidence of title to the land in controversy, the deed from one Benjamin Newman and wife, to Jesse T. Newman and John B. Duncan, the same being a special deed of trust, together with a paper purporting to be a deed for said lands from the said Jesse T. Newman and John B. Duncan, to the plaintiffs. 2. The court admitted as evidence of legal title in this cause, a paper signed by Benjamin Newman and others, not conveying the land in controversy to any person, or being a deed of any kind conveying to the plaintiffs any portion of said land; and 3. All the deeds and papers presented in evidence in said cause by the plaintiffs were inadmissible as evidence, and did not prove a legal title in the plaintiffs.

This error will be considered in connection with the first error assigned, as they embrace the same matters.

The bill of exceptions recites, that “the above papers, the execution of which was duly proven or admitted, was all the paper evidence in the case.” The bill of exceptions further states: “The defendant objected to said evidence going to the jury, which objection was overruled by the court.” The objection to these several instruments of evidence is general, no special objection to any one of them being stated. Such objections cannot now, for the first time, be heard in this court. This is a settled rule.

In the case of *Conway v. Case*, 22 Ill. 139, this court said that parties could not be permitted to stand by, and permit evidence to be introduced, without specific objections, which is competent evidence in itself, and the objections to which is formal, and can be obviated if made by proof, and afterwards make the introduction of such evidence ground of objection in this court.

In *Sargeant v. Kellogg*, 5 Gilm. 281, it was held, where various objections may be made to evidence, some of which may be removed by other proof, the party making the objections ought to point out specifically those he insists on, and thereby put the adverse party on his guard, and afford him an opportunity to obviate them. He should not be permitted, after interposing a general objection, to insist on particular objections in this court, which, if they had been suggested in the court below, might have been instantly removed. So, in the case of *Swift v. Whitney*, 20 Ill. 144, and in *Buntain v. Bailey*, 27 Id. 410, it was held, where evidence is obnoxious to a special objection, that objection must be stated. But the party is not precluded from showing in this court, and insisting upon the insufficiency of the evidence, or of availing himself of radical defects in the instruments of evidence, which could not be obviated by proof, and which strike at the foundation of the plaintiffs' claim.

The defendant was the source of the plaintiffs' title,—they claiming through a deed executed by him to Gregory and Whitmore. This deed is tripartite,—appellant and wife being parties of the first part, Gregory and Whitmore parties of the second part, and Rhodes and Pegram, as partners, parties of the third part. It is in the usual form of a deed of trust, conveying to them absolutely, and to the survivor of them, the premises in controversy, together with a large number of other tracts of land. “In trust, however, for the following purpose: Whereas the mercantile firm of H. R. Gillespie & Co., of which said Henry R. Gillespie is a member, have executed and delivered to Rhodes, Pegram, & Co., their two negotiable promissory notes of even date herewith, both payable to the order of said Rhodes, Pegram, & Co., one for the sum of \$4,238.87, due on the 1st of May, 1855, and the other for the sum of \$4,470.12, due on the 15th of August, 1855. Now, if said notes shall be well and truly paid at their maturity, respectively, then this deed shall be void, and the property hereinbefore conveyed shall be released at the cost of the said parties of the first part, but if said notes, or either of them, or any part of either, shall not be so paid, then this deed shall remain in force, and the said parties of the second part, or the survivors of them, or the heirs and assigns of such survivors, may proceed to sell the property hereinbefore described, or any part thereof, at public vendue, to the highest bidder, at the courthouse in Jacksonville, Illinois, for cash, first giving twenty

days' public notice of the time, terms, and place of said sale, and of the property to be sold by advertisement in some newspaper, printed in said Jacksonville; and upon such sale, shall execute and deliver a deed in fee-simple of the property sold to the purchaser or purchasers thereof, and receive the proceeds of said sale, and out of them pay, first, the costs and expenses of this trust, and next, whatever balance may be unpaid on said notes, whether matured or not, rebating interest at the rate of ten per cent per annum on such portion thereof as has not then matured, and the remainder pay over to the party of the first part, with a covenant that the party of the second part will faithfully execute the trust," etc. The deed is dated January 19, 1855, and duly acknowledged and recorded.

The notes being unpaid, the trustees on the 11th of January, 1856, advertised the lands in the mode required by the deed for the sale on the 1st of February, 1856, without redemption, and on that day they were sold at public vendue at the place designated by David A. Smith, acting as agent of the trustees, in one parcel, to one James W. Robinson, who was the highest bidder, for the gross sum of \$8,988.26, which was paid down in cash.

Immediately after the sale, Robinson permitted Benjamin Newman to take his place as purchaser, in consideration of eleven thousand six hundred dollars paid him, and on the 12th of March, 1856, the trustees executed the deed to Newman. This deed recites the printed advertisement for the sale of the lands, describing them particularly, with the printer's certificate, and there is made as part of the deed, an instrument executed five days after the sale, signed by appellant and Robinson, of the following purport: "Pursuant to the foregoing annexed notice, at the time and place therein specified, with the assent of the undersigned, Henry R. Gillespie, the lands specified in said notice, were offered for sale in one parcel by David A. Smith, as agent for the trustees named in the aforesaid notice, and on such offering were struck down to the undersigned, James W. Robinson, at the sum of \$8,988.26, he being the highest and best bidder therefor, which he paid in hand in full satisfaction of the deed of trust referred to in said notice, and the costs and charges of executing and foreclosing the same; and in consideration of the sum of eleven thousand six hundred dollars, the said undersigned assigns and transfers his said purchase, and all

benefit of the same, to Benjamin Newman, and requests said trustees to execute to him, his heirs and assigns, the proper deed of conveyance and assurance of the premises. Given under our hands and seals, at, etc., this sixth day of February, 1856."

After these recitals, the deed conveys and quitclaims the lands to Benjamin Newman, his "heirs and assigns forever."

In opposition to these facts, it is now said, the deed of appellant was but a mortgage — a mere security for the payment of his notes, and that the sale of the lands was invalid, they having been sold *en masse*, and without redemption.

Acknowledging to the fullest extent the doctrine that, in construing deeds and other written instruments, that the intention of the parties, to be ascertained from the face of the paper, must control, we are entirely satisfied that this deed was a trust deed, and conveyed the absolute legal title in the lands to the trustees Gregory and Whitmore.

There is no single expression in this deed characteristic of a mortgage. The intention of the parties is so manifest that it was designed to convey the legal title upon a declared trust that argument could not make it plainer. Nothing contained in the deed raises a presumption even that it was intended only as a security in the nature of a mortgage, but for what it really is, an absolute conveyance on a declared trust. If the deed was a mortgage, the argument of the appellant as to the sale under it might have force; but being a trust deed, it is out of place.

The deed of trust conveying an absolute title in fee-simple to the trustees, by their sale and conveyance to Newman, the like title was vested in him. No right of redemption exists in any party. It is only where lands are sold under a decree in equity for the sale of mortgaged lands, that a mortgagor can redeem: Scates's Comp. 977. Here was no mortgage and no judicial proceedings, but an absolute sale of the lands by the parties holding the title in fee-simple. A deed of trust, or a mortgage with power to sell, renders an application to a court unnecessary.

That it was sold *en masse* cannot now be objected, as the record shows they were so sold with the assent of the appellant, who acknowledged at the same time the agency of the party selling. It is only upon the ground of fraud, or that some one may have been prejudiced by a sale of real estate *en masse*, that the sale would be set aside in equity because

the property was not sold in separate parcels: *Ross v. Mead*, 5 Gilm. 171. Nothing of this kind is shown in this case. We know no rule of law forbidding the absolute owner of land from employing an agent to conduct the mechanical parts of a sale, or acting as the auctioneer, even if the legal title is held on a trust declared. It is the uniform practice to employ an agent to advertise and sell lands under such deeds. It is no delegation of any trust confided to the trustees. Although trustees may not in general delegate their powers, yet that they may employ solicitors and agents to do ministerial acts, such as the sale of property, and acts of that nature, the trustees retaining a supervisory power of them, has never been questioned: *Hill on Trustees*, 474, 541. But they were the absolute owners of the fee in the lands, and had the ability of themselves to sell them; and the rule is well understood, where a party is in this position, he may act by an agent or attorney: *Story on Agency*, sec. 16; *Mason v. Wait*, 4 Scam. 133. But the conclusive answer is, that the appellant was present and made no objections, but in fact assented in writing.

But the appellant's counsel says there is no evidence of this assent to sell *en masse*, except these recitals in the deed, and they are not admissible as evidence against appellant or any one else but the makers of the deed. This recital sets forth a written agreement between appellant and Robinson, the highest bidder and purchaser at the sale, that the sale of the lands in one mass, and turning over the bid to Benjamin Newman, were made and done with the consent of appellant. He no doubt received the benefit of the advance paid by Newman. But the specific objection that appellant had not executed any such assent or agreement was not made on the trial. Had it been made, it could have been easily removed by calling the subscribing witness, Mr. Smith, who was in reach of the court. Such proof was waived, and the instrument used as evidence without a specific objection to this, or to any other particular portion of it. But did not Robinson and the appellant, by their own voluntary act, become parties to this deed? They certainly did, and being parties to it, are bound by the recitals in it.

The objection going to the acknowledgment of the deed as having been taken before an officer not authorized to take it, is in the same category. It was not made in the court below, and the proper execution of the deed was admitted by the appellant.

There is no objection made to the deed of trust from Benjamin Newman to Jesse T. Newman and John B. Duncan, except want of title in B. Newman. This we have shown to have no foundation. B. Newman acquired an absolute title in fee, and he may have disposed of the lands, a matter about which the appellant cannot possibly have the least concern. We refrain, therefore, from going into that portion of the case. The lands were disposed of by their owner to pay his debts by agreement with the most, if not all, of his creditors, and by a good and valid deed the title to the premises in controversy has become vested in appellees. After the conveyance to Benjamin Newman, the appellants ceased to have any interest in the lands, and if Newman squandered them, his creditors, not appellant, have cause to complain. This is not a creditor's bill. He was fairly divested of his title by his own voluntary deed, and the lands, or their proceeds, were appropriated according to the deed. They discharged his debts, and if they have not discharged Newman's also, if his creditors are losers by the improper conduct of his trustees, with them lie the demand for a remedy.

We cannot see the slightest ground of defense to this action, and nothing to justify any claim set up by the appellant. Selling the lands *en masse* was his own act, and he can, therefore, allege no fraud therein. The deed was an absolute deed — the sale under it was irredeemable. To no act done by the owner of them by the purchase at this sale can the appellant take any exception, or claim any right as against the appellees.

There being no error on the record, the judgment is affirmed.  
Judgment affirmed.

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**SETTING ASIDE SALE OF LAND SOLD EN MASSE INSTEAD OF IN SEPARATE PARCELS:** See *Lay v. Gibbons*, *post*, p. 487, and note. The principal case is cited to the point that it is only on the ground of fraud, or that some one may have been prejudiced by a sale of lands *en masse*, that the sale will be set aside in equity, because it was not sold in separate parcels: *Prather v. Hill*, 26 Ill. 404; *Fairman v. Peck*, 87 Id. 163.

**EVIDENCE SHOULD BE OBJECTED TO WHEN OFFERED:** See *Clauser v. Stone*, *ante*, p. 299, and note. The rule that objections to evidence must be specific, applies only to such objections as can be obviated by other evidence or by the act of the party or the court: *Clauser v. Stone*, *supra*, and note. The principal case is cited to the point that objections to the evidence which might have been obviated if made at the trial cannot be raised for the first time in the appellate court: *Board of Education v. Greenebaum & Sons*, 39 Ill. 615; *Graham v. Anderson*, 42 Id. 517; *Clevenger v. Dunaway*, 84 Id. 370; *Hewell v. Edmonds*, 47 Id. 85.



**TRUST DEED AS DISTINGUISHED FROM MORTGAGE:** See *Koch v. Briggs*, 73 Am. Dec. 651, and note 656.

**TRUSTEE MAY EMPLOY AUCTIONER TO MAKE SALES:** *Gibson's Case*, 17 Am. Dec. 257; *McCready v. Lansdale*, 58 Miss. 877, citing the principal case.

**PLEAS CONCLUDING TO COUNTRY NEED ONLY SIMILITER TO COMPLETE ISSUES**, and there is no necessity for a rule to add it, as it may be added by the defendant if he chooses to do so, and a trial may be had without it: *Nieman v. Winter*, 85 Ill. 469; *Hansen v. Pierson*, 83 Id. 242, citing the principal case.

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## OHIO AND MISSISSIPPI R. R. Co. v. MUHLING.

[80 ILLINOIS, 9.]

**ONE WHO HAS BEEN EMPLOYED BY RAILROAD COMPANY**, but who, in pursuit of his private business, takes passage on the cars of the company, is a passenger, though no fare is collected from him.

**LIABILITY OF PASSENGER CARRIER IS NOT AFFECTED BY FACT THAT NO FARE IS COLLECTED** from the injured passenger; the only inquiry is, whether or not he was lawfully on the train.

**RAILROAD COMPANY CARRYING PASSENGERS ON CONSTRUCTION TRAINS** must be held to the same degree of diligence as when regular passenger coaches are used.

**ACTION** by Muhling against the plaintiff in error for injuries sustained while riding on one of the trains of the company. The road was in course of construction, and the plaintiff boarded a construction train for the purpose of being carried to a town on the road, and of purchasing there a sack of flour, and while the train was crossing Shoal Creek the trestle bridging gave way, precipitating the cars to the ground below, and thereby injuring the plaintiff. The evidence showed that the plaintiff had been in the employ of the company as an axeman, and had worked in leveling the roadway, and two days before the accident had been engaged in this work. Verdict for the plaintiff. Motion for a new trial overruled, and errors assigned by the defendant.

*William Holmes*, for the plaintiff in error.

*Gustavus Kaerner*, for the defendant in error.

By Court, WALKER, J. The evidence shows that defendant in error, when he received the injury, was going from his residence to Trenton or Summerfield, to purchase flour. He was in the pursuit of his own business, and not that of the company. Whatever might have been his former relations with

the company, he was then engaged in his own business. He was at that time in the situation of any other stranger to or passenger upon the road, liable to no greater burdens nor entitled to more privileges than any other passenger similarly situated. He had no control over the running of the train, was not then engaged in the business of the company, and was, as far as this record discloses, free from all negligence, and was in no wise responsible for the injury, nor did his connection with the road in the remotest degree contribute to the misfortune.

The evidence clearly shows that this trestle-bridge was imperfectly and insecurely constructed. This is not controverted. It must then follow that, as the injury was produced by the insufficient structure made by the company, and without any fault of plaintiff in error, the company should be responsible.

It is, however, urged that the plaintiff had paid nothing for his passage. This can make no difference, as the company had the right to demand the fare at the time he came upon the road, and upon failing to pay might have put him from the cars. Or they might have afterwards collected it, or if the company was indebted to him, as the evidence tends to show, they could have deducted it from that indebtedness. But even if they were carrying him gratuitously, it could make no difference: *Gillenwater v. Madison and Indianapolis R. R. Co.*, 5 Ind. 339 [61 Am. Dec. 101]; *Philadelphia etc. R. R. Co. v. Derby*, 14 How. (U. S.) 468. When a person is upon a train under such circumstances, the only inquiry is, whether he was lawfully there, and not whether he had paid his money for the privilege. So that, in point of fact, it can make no difference in this case whether plaintiff in error had paid for his passage, or whether he was there by permission, to be carried without compensation, as it does not appear that it was unlawful. The evidence shows that the road had been carrying passengers for pay on their construction trains, and they must be held to the same degree of diligence with that character of train as with their regular passenger coaches, for the safety of the persons, and lives of their passengers: *Chicago and Burlington R. R. Co. v. Hazzard*, 26 Ill. 373.

In view of the whole of the evidence in this case, the company must be held liable for the injury. The evidence warrants the verdict, and as no error is perceived in this record, the judgment must be affirmed.

Judgment affirmed.

**DEGREE OF CARE EXACTED OF CARRIERS OF PASSENGERS:** *Tuller v. Talbot*, 76 Am. Dec. 695, note citing prior cases 698; with respect to road, vehicles, and appliances: *Curtis v. Rochester etc. R. R. Co.*, 75 Am. Dec. 258, and note 268.

**PAYMENT OF FARE AS AFFECTING LIABILITY OF PASSENGER CARRIER:** *Nolton v. Western R. R. Corp.*, 69 Am. Dec. 623, note 628; see *Lucas v. New Bedford etc. R. R. Co.*, 66 Id. 406; *Galena etc. R. R. Co. v. Yarwood*, 65 Id. 682. In *Toledo etc. R'y Co. v. Brooks*, 81 Ill. 249, it is held, distinguishing the principal case, that no recovery can be had of a railroad company for a personal injury to a passenger on its train of cars or for his death, caused by mere negligence when he knowingly and fraudulently induces the conductor to disregard his duty and defraud the company out of the amount of his fare for his own profit.

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## BEST v. ALLEN.

[30 ILLINOIS, 80.]

**EXEMPLARY DAMAGES MAY BE AWARDED IN TRESPASS FOR ENTERING PLAINTIFF'S PREMISES** and willfully damaging his goods, notwithstanding the defendant made the entry in good faith under the belief that he had a right to enter. A willful injury to goods is as much a ground for exemplary damages as a willful entry.

**HOMESTEAD LAW OF ILLINOIS MAKES RELEASE OF HOMESTEAD RIGHT BY WIFE NECESSARY** to the validity of all conveyances of the homestead, and a deed of trust or mortgage of the premises, and a sale thereunder, is invalid without such release.

**TRESPASS** by Allen against Best and Snell for entering plaintiff's house and injuring the furniture. The defendant pleaded not guilty, and that he was the owner of the house and entitled to the possession, and that he and his servant Snell entered the premises and removed the goods and chattels of the plaintiff without unnecessary damage. Best claimed title under a mortgage of the premises executed to him by the plaintiff Allen, with the power of sale in case of default of payment of the note as security for which the mortgage was given. Best sold the premises under this power to one Sparks, and executed to him a deed. Afterwards Sparks quitclaimed to Best. Defendants excepted to the instructions given. The verdict was for the plaintiff for \$134. Motion for new trial overruled, and appeal by the defendants.

*Gilbert and Rinaker*, for the appellants.

*O. A. Walker, and Stuart, Edwards, and Brown*, for the appellee.

By Court, CATON, C. J. We think both of the instructions given for the plaintiff are correct. In the first, the jury are told that if the defendant entered the plaintiff's premises and willfully damaged his goods, they may give exemplary damages. It is argued that if the defendant entered in good faith, and under the belief that he had a right to enter and eject the plaintiff's family, that his willful injury of the goods in doing so should not subject him to smart money. We do not so understand the law. A willful injury of the goods is as much a ground for exemplary damages as a willful entry when the party knows he had no right of entry.

The second instruction is this: "That if they believe, from the evidence, that the plaintiff in this cause was in possession of and occupying the said premises as a homestead at the time of the execution of the mortgage from plaintiff to defendant, and that Frances E. Allen is the wife of said plaintiff, and was so at the date of the mortgage, and that she still continued to occupy the same as a homestead, the possession of the said Frances E. Allen is the possession of the plaintiff; and that plaintiff, under the act of the legislature entitled 'homestead,' in force July 4, 1851, is entitled to retain possession of said premises, notwithstanding said mortgage, and the jury must find for the plaintiff."

As this mortgage was in effect a deed of trust, containing a power of sale, and under which the property was sold, it is insisted that it is not affected by the homestead law of 1851. That may be true; but this mortgage was executed in 1860, and consequently comes under the operation of the amendment of 1857, which, as we have decided at this term, in the case of *Patterson v. King*, 29 Ill. 514, applies to all conveyances, and makes the release of the homestead right by the wife necessary to the validity of all conveyances of the homestead. Under this decision this instruction was undoubtedly right. The plaintiff was *prima facie* the owner of the land.

We shall not review the evidence on the motion for a new trial. We are entirely satisfied with the verdict. Here was an unwarrantable attempt by the defendant to take the law into his own hands, in a case where he had no right to take the possession, and even if his title had been good he should have brought ejectment to obtain the possession. And in removing the plaintiff's goods, we agree with the jury that the

evidence shows he did willful damage. All the circumstances of the case show an aggravated outrage.

The judgment is affirmed.

Judgment affirmed.

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**CONVEYANCE OF HOMESTEAD:** See *Sharp v. Bailey*, post, p. 439, and note citing prior cases. The principal case is cited to the point that it is essential to a release of the homestead right that the wife should join in the deed: *Marshall v. Barr*, 35 Ill. 108.

**EXEMPLARY DAMAGES, WHEN AWARDED:** See *Smithwick v. Ward*, 75 Am. Dec. 453, note 456; *New Orleans etc. R. R. Co. v. Harst*, 74 Id. 785; *Ohio etc. R. R. Co. v. Tindall*, Id. 259; *Chiles v. Drake*, Id. 406, and note 413; *Winham v. Rhams*, 73 Id. 116; *Peoria Bridge Ass'n v. Loomis*, 71 Id. 263, note 266; *Hasley v. Brooks*, Id. 252, note citing prior cases 256.

**CASES**  
**IN THE**  
**SUPREME COURT OF JUDICATURE**  
**OF**  
**INDIANA.**

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**PROCTOR v. OWENS.**

[18 INDIANA, 21.]

**DEER WORDS, SPOKEN OF WOMAN, ARE ACTIONABLE PER SE:** "Baden saw or told me that on Sunday, at the camp-meeting, he either scared or drove Jane Owens and a man supposed to be Jo. Dearmond, up from behind a log; he and others supposed it to be Jo. Dearmond; they broke and ran; I [Baden] got her parasol and handkerchief, and if any one don't believe me, they can come and see them."

**WORDS CALCULATED TO INDUCE HEARERS TO SUSPECT** that the plaintiff was guilty of adultery, are actionable *per se*.

**IN ACTION FOR SLANDER, COURT MAY PERMIT PLAINTIFF TO AMEND** his complaint, after the trial has been entered upon, by inserting additional words, or by correcting those already in the complaint, but not by inserting an entirely new set of words essentially different from those previously alleged.

**APPEAL** from the Decatur circuit court. The opinion states the case.

*Cumback and Bonner*, for the appellant.

*O. B. Hord and J. S. Scobey*, for the appellee.

By Court, **WORDEN, J.** This was an action for slander by the appellee against the appellant. Trial, verdict, and judgment for the plaintiff.

There was a demurrer sustained to the third paragraph of the defendant's answer. This is assigned for error, but the point is not noticed in the brief of counsel for the appellant, hence it will not be noticed by us. It is claimed, however, that the complaint is bad. The complaint is clearly good, as

it charges that the defendant said of the plaintiff, *inter alia*, that she was caught in the very act of adultery.

On the trial, the plaintiff proved that the defendant said of the plaintiff, that "Baden saw or told him that on Sunday, at the camp-meeting, he either scared or drove Jane Owens, and a man supposed to be Jo. Dearmond, up from behind a log; he and others supposed it to be Jo. Dearmond; that they broke and ran, and that he [Baden] got her parasol and handkerchief, and if any body did not believe him, he could come and see them." The plaintiff then asked the witness, by whom the speaking of the words was proven, what he understood the defendant to mean by what he said about the parties being scared up. This question was objected to, but the objection was overruled, and the witness answered that he understood the defendant to mean that the parties were caught in the act of sexual intercourse. The admission of the testimony as to the understanding of the witness is relied upon for a reversal. In what cases the jury are to judge of the meaning of the words, and when and for what purposes the understanding of those to whom they are addressed may be proven, are points which we deem it unnecessary here to decide. The following authorities, however, may be cited as having more or less bearing upon these questions: *Prichard v. Lloyd*, 2 Ind. 154; *Thompson v. Grimes*, 5 Id. 385; *Smawley v. Stark*, 9 Id. 386; *Ausman et Ux. v. Veal*, 10 Id. 355 [71 Am. Dec. 331], and note 2; *Snell v. Snow*, 13 Met. 278; *Miller v. Butler*, 6 Cush. 71 [52 Am. Dec. 768]; 2 Greenl. Ev., 8th ed., sec. 417, and note; 2 Starkie on Slander, p. 51; *Justice v. Kirlin*, 17 Ind. 588; 1 Starkie on Slander, p. 60, and notes.

The words thus proven are, in our opinion, slanderous and actionable *per se*. To be sure, adultery is not directly and in terms charged, neither is it necessary that it should be. Thus in *Drummond v. Leslie*, 5 Blackf. 453, it was held that if the words were calculated to induce the hearers to suspect that the plaintiff was guilty of the crime, they were actionable. See also 1 Starkie on Slander, 59. So also in *Shields v. Cunningham*, 1 Blackf. 86, it was held that a charge that Dr. Eddy made an appointment with the plaintiff, scaled the walls, and went to bed to her, were actionable. In *Guard v. Risk*, 11 Ind. 156, it was held actionable to charge the plaintiff with having slept with George Vestill two nights. In neither of these cases was adultery charged, but was left to be inferred from facts that were charged. The inference that adultery was commit-



ted was no doubt naturally and correctly drawn from the facts charged. So here, if Baden scared or drove the parties up from behind a log at a camp-meeting; if they broke and ran; and if, in the plaintiff's flight and perturbation, she left behind her parasol and handkerchief, which fell into the hands of Baden as trophies, the conviction naturally and almost irresistibly forces itself upon the mind that adultery was either committed or about to be committed. At all events, it would cause persons to very strongly suspect that such was the case.

The words proven being actionable in themselves, the defendant was not injured by proof that the witness understood them in an actionable sense. Hence we need not decide whether the testimony was admissible, the error, if error was committed, being harmless.

But it is objected that the words proven vary from those charged in the complaint. There are several sets of words charged in the complaint, some of which are substantially the same as those proven, varying in some slight particulars. The variance might have been cured by an amendment below, within the ruling in *Lister v. McNeal*, 12 Ind. 302; and the amendment will be deemed to be made here: 2 R. S. 1852, p. 162, sec. 580.

An instruction of the court is complained of. The one alluded to is somewhat lengthy, and need not here be set out. It asserts no proposition of law, nor does it take from the jury the consideration of the facts. It might be regarded as a short disquisition on mental philosophy, stating the influence which "extreme piety, bigotry," or self-righteousness, may have upon the minds of some persons in drawing conclusions as to character from given premises.

But as no legal proposition is asserted, and the case was left fully to the consideration of the jury on the facts, we cannot say that any error was committed.

The judgment is affirmed, with costs, and one per cent damages.

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WORDS IMPUTING CRIME ARE ACTIONABLE PER SE: See *Little v. Barlow*, 71 Am. Dec. 219, note 220, where other cases are collected. Words imputing to female want of chastity are actionable *per se*: *Smith v. Silence*, 66 Id. 137, note 143.

COMPETENCY OF TESTIMONY AS TO HOW WITNESSES UNDERSTOOD LIBELOUS MATTER: See *Hawks v. Patton*, 63 Am. Dec. 266, note 268, where other cases are collected. In an action for libel, the plaintiff may prove by witnesses whom and what they understood certain words in published articles

to refer to: *De Armond v. Armstrong*, 37 Ind. 56, citing the principal case. Where the words proven are actionable in themselves, the defendant is not injured by proof that witnesses understood them in an actionable sense: *Gabe v. McGinnis*, 63 Id. 547, citing the principal case.

IT IS NOT NECESSARY THAT ADULTERY BE CHARGED IN TERMS; it is sufficient if the inference that adultery was committed may be fairly drawn from the matters which are charged: *Waugh v. Waugh*, 47 Ind. 584; *Roe v. Chitwood*, 36 Ark. 214, both citing the principal case; see also *Walton v. Singleton*, 10 Am. Dec. 472.

THE PRINCIPAL CASE IS CITED in *Gebhart v. Barkett*, 57 Ind. 384, to the point that exceptions taken by the appellant, but not discussed in his brief, will not be considered by the court; and in *Record v. Ketcham*, 76 Id. 485, to the point that after a jury has been sworn, and evidence heard, a complaint cannot be amended so as to introduce a new cause of action.

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## BANSEMER v. MACE.

[18 INDIANA, 27.]

ADVERTISEMENT OF SALE OF LANDS MORTGAGED TO TRUST FUNDS, which has been published for sixty days before the day of sale, is sufficient, and is not vitiated by the fact that in the description of the lands such abbreviations as these are used: "The w. hf. of the n. w. qr. of sec. 35, in t. 23 n., of r. 4 w."

AUDITOR OF STATE MAY ACT BY DEPUTY AT SALE OF LANDS mortgaged to trust funds. And if such deputy is regularly appointed and acts in that capacity after having taken his oath of office before a person not authorized to administer such oath, he will be deemed an officer *de facto*, and his acts will be held valid in respect to third persons who may be interested, where he is not himself a party, and not, therefore, called upon to justify acts done in his official capacity.

STATE OFFICERS ARE NOT BOUND TO OFFER FOR SALE, IN PARCELS, lands mortgaged to trust funds; but they may do so, if necessary, to enable them to realize the amount of the debt and costs.

IN CONSTRUING STATUTE "MAY" WILL BE CONSTRUED TO BE SYNONYMOUS WITH "SHALL," where the public or third persons have a claim *de jure*, that the power should be exercised, but where this is not the case, "may" will not be construed as "shall."

APPEAL from the Tippecanoe circuit court. The opinion states the case.

*George Gardner*, for the appellants.

*D. Mace and R. C. Gregory*, for the appellees.

By Court, DAVISON, J. This was a suit by John C. Bansemer and others, the heirs at law of Loyal Fairman, deceased, against Daniel Mace and others, to set aside a sale, made under a mortgage, on the west half of northwest quarter of section 35, in township 23 north, of range 4 west, in Tippe-

canoe County. The mortgage bears date of May 3, 1839, and was executed by Fairman, while in life, to Nathan B. Palmer, superintendent of the loan office, to secure the payment of four hundred dollars to the college fund, at five years, with nine per cent interest, payable yearly in advance. It is averred in the complaint that, on the 23d of January, 1858, the principal and interest due on the mortgage amounted to \$589.90, and that on said day the real estate so mortgaged was offered for sale, ostensibly by John W. Dodd as auditor, and Aquilla Jones as treasurer, of state, and sold to Daniel Mace and Godlove O. Behm for \$410. This sale is alleged to be irregular and void: 1. Because the advertisement under which it was made was insufficient; 2. The auditor and treasurer did not attend the sale, either in person or by deputy; 3. The mortgaged premises were not offered for sale in parcels, though they were of the value of three thousand dollars, and capable of being divided. The issues were submitted to the court for trial. Finding for the defendants, motion for a new trial denied, and judgment, etc. The only question raised in argument is, Was the evidence sufficient to sustain the finding?

A transcript of the record of the sale, from the auditor's office, authenticated by the auditor of state, was given in evidence. By that transcript it appeared that the sale of the land was duly advertised in the Indiana State Sentinel, a newspaper of general circulation published at Indianapolis, for sixty days prior to the 23d of January, 1858, the day of sale. But the advertisement itself, as printed in said newspaper, was also given in evidence, which, so far as it relates to the sale in question, reads thus:—

“**SALE OF LANDS MORTGAGED TO TRUST FUNDS.**—The following described lands will, on Saturday, the twenty-third day of January next, between the hours of nine o'clock A. M. and four o'clock P. M., at the court-house door, in the city of Indianapolis, be offered for sale to the highest bidder, the same having been mortgaged to the state of Indiana, to secure the payment of loans made on account of several funds therein named. No bid will be taken for a less sum than the amount chargeable.” The advertisement then proceeds to describe various tracts of land, and among them the land in controversy is described as follows: “No. 306. The w. hf. of the n. w. qr. of sec. 35, in t. 23 n., of r. 4 w., containing eighty acres in Tippecanoe County; mortgaged by Loyal Fairman. Principal, interest, damages, and costs, \$554.30.”

This advertisement is said to be objectionable because it has no date; because it does not sufficiently describe the property to be sold; because it states the sum due to be \$554.30 when the amount actually due was \$589.90; and because the fund, on account of which the land was to be sold, is not named. None of these objections are available. The proof is that the advertisement was published sixty days prior to the 23d of January, 1858, and it sufficiently shows that these sixty days were next before the day of sale. The abbreviations in the description of the land are easily understood, and moreover, the statement in effect that the tract of land contained eighty acres, was situated in Tippecanoe County, and was mortgaged by Loyal Fairman, was of itself a description sufficient in an advertisement of sale. Nor was it at all important that the particular fund, out of which the loan was made, should be named in the advertisement, or that the amount due should be therein accurately stated, because the omission to state in the advertisement the name of the fund, or the exact sum to be collected, could not, to any extent, vary the result of the sale, or affect the rights of the parties. In reference to the second alleged irregularity, namely, that the auditor and treasurer did not attend the sale, the proof is that the treasurer did attend; that Dodd, the auditor, was not personally present, but that one Trumble G. Palmer attended, and acted as deputy auditor. The statute says: "At the time appointed for such sale, the auditor and treasurer of state shall attend": 1 R. S., p. 510. There is, however, another statute which authorizes the auditor to appoint a deputy, and provides that he "shall take the oath required of his principal, and may perform all the official duties of his principal, being subject to the same regulations and penalties": Id., p. 256, secs. 1, 2. No doubt the sale of the land, in this instance, was an official duty which the auditor could perform by deputy. But it appeared in evidence that Palmer, though he was regularly appointed as deputy, had the oath which he took as such administered by the auditor himself. Hence it is insisted that he could not legally act under his appointment. This position, when applied to the case at bar, is not strictly correct. Our statute, it is true, confers no authority upon the auditor of state to administer such oath; and Palmer was not, therefore, properly inducted into office. He was, however, regularly appointed, and the evidence proves that as deputy, he had discharged the duties of auditor continually since the 14th of

March, 1857; and the result is, he must, in the performance of the duties of auditor at the sale in question, be regarded a deputy,—not *de jure*, but *de facto*. This, then, being the case, the sale, so far as it was conducted by Palmer, is legal and operative, because the rule is well established that the act of an officer *de facto*, in the ordinary exercise of the functions of his office, are valid in respect to third persons, who may be interested. This rule is deemed necessary to prevent a failure of justice. Thus it has been decided that “the acts of a deputy sheriff duly appointed, but not having taken the required oath, in levying an execution on real estate, were valid, as they respected third persons”: *Buckman v. Ruggles*, 15 Mass. 180 [8 Am. Dec. 98]; *People v. Collins*, 7 Johns. 549; *McGregor v. Balch*, 14 Vt. 428 [39 Am. Dec. 231]; *Wheeler’s Am. Com. Law*, p. 142. Where, however, an officer is himself called upon to justify an act done in the discharge of his official duties, his defense will not be held effective, unless it shows, not only a valid election or appointment, but also his legal induction into office: *Courser v. Powers*, Am. Law Reg., N. S., 268, and cases there cited. But in the case before us, the deputy auditor is no party, and is, of course, not called upon to justify his official conduct at the sale. He has no interest in the suit, and his acts are considered only so far as they relate to the interest of third persons, and must in that respect be held valid.

The third alleged irregularity in the sale remains to be considered. Were the state officers, who conducted the sale, bound to offer the mortgaged lands in parcels? The statute provides that “the auditor shall make sale of so much of the mortgaged premises, to the highest bidder, for cash, as will pay the amount due for principal, interest, damages, and costs, and such sales may be in parcels, so that the whole amount may be realized”: 1 R. S., 510, sec. 44.

There was evidence tending to prove that the deputy auditor, when he commenced the sale, stated the amount of the debt, etc., to be \$580.90, and then asked if any one present would give that sum for any less number of acres than was contained in the entire tract; and no one bidding, he offered the whole tract, etc. This was not an offer to sell in parcels; it was, however, in effect, a proposal to sell as much, and no more, of the land than would pay the sum collectible on the mortgage. But as we have seen, the statute says, “such sales may be in parcels, so that the whole amount may

be realized." Upon this branch of the statute, it is argued that the word "may," as used in reference to "sales in parcels," imports "shall," and in sequence, the offer to sell the entire tract, without first offering it in parcels, was unauthorized. "In the construction of statutes the word 'may' will be construed to be synonymous with 'shall,' where public interests and rights are concerned, and where the public or third persons have a claim *de jure* that the power should be exercised": *Newburgh Turnpike v. Miller*, 5 Johns. Ch. 101 [9 Am. Dec. 274]; *Nave v. Nave*, 7 Ind. 122. Had this mortgagor a right, in this instance, to have the power to sell in parcels exercised? As we construe the statutory provision referred to, it is only where the sum due cannot be realized by an offer to sell the entire tract, that the auditor may sell in parcels. This construction being correct, and we think it is, the provision, so far as it relates "to a sale in parcels," is for the benefit of the fund, and not the mortgagor. It follows, he had no right to have the power "to sell in parcels" exercised; and consequently, none to have the word "may" construed to be synonymous with "shall." In our opinion, the finding was right on the evidence, and the judgment must therefore be affirmed.

The judgment is affirmed, with costs.

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PUBLICATION OF NOTICE: See *Maddox v. Sullivan*, 44 Am. Dec. 234, note 238.

WORD "MAY" WHEN CONSTRUED TO BE EQUIVALENT TO "SHALL": See *People v. Brooks*, 43 Am. Dec. 704, note 706, where other cases are collected. The word "may" will be construed as synonymous with "shall," where public interests and rights are concerned, and where the public or third persons have a claim *de jure* that the power should be exercised: *State v. Buckles*, 39 Ind. 275; *Gill v. State*, 72 Id. 279; *Gray v. State*, Id. 576, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Vail v. Kernan*, 21 Ind. 425, to the point that naked powers of an agent not coupled with an interest must be strictly pursued to render the acts of the agent possessing them valid; and in *Cass v. State*, 69 Id. 48, to the point that the acts of an officer *de facto*, done under color of office, are valid.

## WARD v. BUELL.

[18 INDIANA, 104.]

**BOND, HOWEVER DEFECTIVE, EXHIBITED FOR PURPOSE OF STAYING EXECUTION** or on an appeal, and which is accepted for such purpose by the officer, will have the effect of binding all the parties executing it, and will stay the execution until the court shall quash the bond.

**WHERE BOND ON APPEAL SPECIFIES NO AMOUNT, OR CONTAINS NO PENALTY,** the law will hold the obligors in it liable to the extent required by the statute upon an appeal and *supersedeas*, on the ground of intention in the parties executing it to render themselves liable to that extent.

**SURETIES ON APPEAL BOND MAY EXPRESSLY LIMIT AMOUNT OF THEIR LIABILITY;** and if they do so, and the officer accepts it, they will not be bound beyond the amount named; but if that amount proves insufficient, the officer will be liable for the deficiency.

**APPEAL** from the Marion circuit court. The opinion states the case.

*J. A. Beale and Thomas A. Hendricks, for the appellants.*

*John L. Ketcham, for the appellee.*

By Court, PERKINS, J. This suit was founded on a written instrument, as follows:—

“Know all men by these presents, that we, — and —, are held and firmly bound unto Lucius C. Buell in the penal sum of —, and for the payment of which we bind ourselves, our heirs, and executors. Sealed and dated this — day of —, A. D. 1858. The condition of the above obligation is such that if the said Ephraim G. Ward shall duly prosecute an appeal by him taken to the supreme court of Indiana from a judgment rendered in the Hancock circuit court in favor of Lucius C. Buell against said Ephraim G. Ward, and shall pay such judgment as may be rendered against Ephraim G. Ward in said supreme court and in favor of said Lucius C. Buell, then this obligation to be void, else to remain in full force and virtue.

“EPHRAIM G. WARD. [SEAL.]

“GEORGE W. MEARS.” [SEAL.]

This bond was approved by the clerk of the supreme court. The only question in the cause is, whether the obligors are liable upon the bond. The bond was given upon a *supersedeas* order, on an appeal taken after the close of the term at which judgment was rendered, and the legal obligation of such a bond the statute declares to be that the appellant “will duly prosecute his appeal, and abide by and pay the judgment, and



all costs which may be rendered or affirmed against him": 2 R. S. 160, sec. 563.

The statute further declares that no bond or written undertaking "taken by any officer in the discharge of the duties of his office shall be void for want of form or substance, . . . but the principles and sureties shall be bound by such bond, recognizance, or written undertaking, to the full extent contemplated by the law requiring the same; and the sureties to the amount specified in the bond or recognizance": 2 R. S. 213, sec. 790.

This section is confused, and somewhat contradictory, but force must be given to all its parts, if possible.

It provides, first, that "the principal and sureties shall be bound" to the extent of the obligation required by law in the case, without reference to any amount specified in the writing. It provides, further, that the sureties shall be bound "to the amount specified in the bond," etc. The section, taken as a whole, we think, means this:—

1. Any instrument in writing, however defective, which the parties execute for the purpose of staying execution on an appeal, and the officer accepts for such purpose, will have the force and effect of an appeal bond against all the parties executing it, and will stay execution till the court may quash the bond.

2. If the instrument specifies no amount, or contains no penalty, the law will hold the obligors in it liable to the extent required by the statute upon an appeal and *supersedeas* in such case on the ground of intention in the parties executing the instrument to become liable to that extent. But—

3. Sureties may expressly limit the amount of their liability by the terms of the obligation; and if they do, and the officer still is satisfied with it and accepts it, they will not be bound beyond the amount named, but if proving insufficient, the officer might be liable for the deficiency. Such we think the meaning and the policy of the statute.

The judgment is affirmed, with one per cent damages and costs.

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**MISTAKES IN BONDS, WHEN DO NOT VITIATE:** See *Charles v. Hastings*, 77 Am. Dec. 148, note 149. Bonds taken by public officers in proper cases are not vitiated by informalities and defects: *Dunn v. Cracker*, 22 Ind. 327; *Jones v. Dronsberger*, 23 Id. 75; *Miller v. O'Reilly*, 84 Id. 169, all citing the principal case.

## KIGER v. COATS.

[18 INDIANA, 158.]

GIVING OF NOTICE OF AWARD ON SUNDAY IS VALID, for it is not an act of common labor, nor a judicial act, but is simply a ministerial act in connection with a judicial proceeding, and is not specially prohibited by any statute.

APPEAL from the Howard circuit court. The opinion states the case.

*N. R. Lindsay*, for the appellant.

*Henry A. Brouse*, for the appellee.

By Court, PERKINS, J. This was a suit upon an arbitration bond. The leading facts of the case are stated in *Coats v. Kiger*, 14 Ind. 179. It is there decided that in statutory arbitrations copies of the award made must be furnished to the parties to the submission. And the only question presented to this court by the record now before it is, whether the delivery by the arbitrators of copies of such award to such parties, on the Lord's day, commonly called Sunday, is operative, the award having been made and signed, and the copies drawn on Saturday.

Prior to the establishment of the Christian religion, all acts valid on any day were valid when performed on the first day of the week.

After the establishment of that religion, acts done on the first day of the week were valid until the rule was changed by law. The church changed the rule, as matter of discipline, in 517, so far as to prohibit judicial acts on that day. This rule subsequently became a part of the common law; but this did not apply to ministerial acts; writs still continued to be returnable on Sunday: *Swann v. Broome*, 3 Burr. 1595; S. C., 1 W. Black. 496, and again at 526. Courts may adjourn to and on Sunday: *Id.*; *McCorkle v. State*, 14 Ind. 39. Verdicts may be received on that day: *Id.* In *Matthews v. Ansley*, 31 Ala. 20, the court says: "It is laid down in books of the highest authority, that at common law, the Christian sabbath was *dies non juridicus*; and that no judicial proceeding could be had on that day. It was declared with equal clearness that acts purely ministerial might be legally performed on that day: *Mackaley's Case*, 9 Coke, 66; S. C., Cro. Jac. 279; *Wilson v. Tucker*, 1 Salk. 78; *Drury v. De Fontaine*, 1 Taunt. 135; *Lyon v. Strong*, 6 Vt. 219; *Story v. Elliott*, 8 Cow. 27 [18 Am. Dec.

423]; see also *Shippey v. Eastwood*, 9 Ala. 198; *Hooper v. Edwards*, 18 Id. 280; *Sayles v. Smith*, 12 Wend. 57 [27 Am. Dec. 117]. [See the cases cited in *Cory v. Silcox*, 5 Ind. 370; and in *Smith on Contracts*, by Rawle, *vide* p. 171.]

"The service of the process of attachment is a purely ministerial act; and not being within the provisions of any section of the code, it follows that no valid objection can be urged to its execution on the sabbath day." It was also held that it did not fall within the statute against common labor: *Id.*

As the common law prevails in Indiana, judicial proceedings on Sunday will not be legal here, unless authorized by statute. But the giving of notice of the award in question was not a judicial proceeding. We have a statute prohibiting the pursuit of one's ordinary avocation on Sunday; but it does not appear that acting as arbitrators was the ordinary avocation of those who made and gave notice of the award in question: See *Voglesong v. State*, 9 Ind. 112; *State v. Conger*, 14 Id. 396; *Banks v. Werts*, 13 Id. 203. And in *Strong v. Elliott*, 8 Cow. 27 [18 Am. Dec. 423], it is held that the making of an award does not fall within the statute prohibiting common labor. In New York they have an additional statute prohibiting the service of process on Sunday.

The giving of notice of the award, then, not being an act of common labor, not being a judicial act, and not being specially prohibited by any statute, but being simply a ministerial act, in connection with a judicial proceeding, would seem to be valid, especially as the notice seems to have been received without objection. And the case of *Sargeant v. Butts*, 21 Vt. 101, is directly in point that an award might be signed, and notice of it given to the parties on Sunday where the arbitrators had entered upon and failed to complete the duty on Saturday. See the case noticed in *Smith on Contracts*, by Rawle, *vide* p. 173, note, in connection with *Richardson v. Kimball*, 28 Me. 475. It may be remarked that at common law contracts made on Sunday may be valid. But it is held in this state that they fall within the statute prohibiting common labor: *Banks v. Werts*, 13 Ind. 203; also the cases cited in *Thomasson v. State*, 15 Id. 449.

The judgment is reversed, with instructions to sustain the demurrer to the paragraph of the answer setting up notice on Sunday.

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DELIVERY OF AWARD ON SUNDAY IS NOT INVALID, such an act not being within the ordinary vocation of the arbitrator: *Shaw v. Williams*, 37 Ind. 161, citing the principal case.

**STEIN AND WIFE v. INDIANAPOLIS BUILDING LOAN  
FUND AND SAVINGS ASSOCIATION.**

[18 INDIANA, 237.]

**EXISTENCE OF CORPORATION IS IMPLIED WHERE IT CONTRACTS BY STYLE** which is usual in creating corporations, and which discloses no individuals, and such existence need not be alleged in a complaint by the corporation.

**ACT OF 1857, CONCERNING BUILDING LOAN FUND AND SAVINGS ASSOCIATIONS IS CONSTITUTIONAL**, and so far as it relates to such associations organized before its passage, it merely affects remedies, and does not vary liabilities or divest vested rights.

**VENDOR WHO PURCHASES SUBJECT TO MORTGAGE TAINTED WITH USURY** cannot avail himself of the defense of usury against a bill for foreclosure. **DEFENSE OF USURY IS PERSONAL TO BORROWER** and his heirs and representatives.

**APPEAL** from the Marion circuit court. The opinion states the case.

*Wallace and Coburn*, for the appellants.

By Court, **DAVISON, J.** This was an action by the appellees, who were the plaintiffs, against Cyrus Obetz, and his wife, Sophia Obetz, and Frederick Stein, and Elizabeth Stein, his wife, to foreclose a mortgage executed by Cyrus Obetz and wife to the plaintiffs. The mortgage bears date April 5, 1856, was upon certain lands in Marion County, and was given to secure the performance of the conditions of a bond executed to the plaintiff by the said Cyrus Obetz. The bond is in these words: —

“Know all men, etc., that Cyrus Obetz is held and firmly bound unto the trustees of the Indianapolis Building Loan Fund and Savings Association in the sum of fifteen hundred dollars, which, well and truly to be paid, does bind himself, his heirs, etc., firmly by these presents, sealed with his seal, and dated this thirty-first day of March, 1856. The conditions of the above obligation are such that, whereas, the above bounden Cyrus Obetz was the owner of three shares of stock in said association; and that on the 31st of March, 1856, he sold said shares of stock to said association for the sum of \$400.50, and received payment therefor, with the agreement on his part that he would continue to pay his monthly dues on each of said shares of stock, so sold as aforesaid, at the rate of two dollars per month, payable monthly; and all fines and assessments that might be assessed against him, and interest on said sum of two dollars and fifty cents at the rate of six per

centum per annum, payable monthly, during the continuance of said association, and give other and additional security for the payment of said monthly dues, fines, assessments, and interest, when deemed necessary by the board of directors of said association. Now if the above bounden Cyrus Obetz shall well and truly perform his said agreements, and pay his said monthly dues, fines, assessments, and interest during the continuance of said association, and give other and additional security as aforesaid, then the above obligation to be void and of no effect. But if default be made in either of the above agreements, then the above bounden Cyrus Obetz is to forfeit all monthly dues he may have paid on said shares of stock so sold as aforesaid, and all fines, assessments, and interest he may have paid into said association, and pay back the said sum of \$400.50, with legal interest thereon from the time of said default. And it is further agreed that monthly dues, fines, assessments, and interest, and the said sum of \$400.50, together, or either of them separately, at the option of said association, may be recovered by action in any court of competent jurisdiction, and successive actions may be brought on this agreement, as often as successive defaults, in the payment of said monthly dues, fines, assessments, and interest shall occur, during the continuance of said association. In witness whereof the above-named Cyrus Obetz has hereunto set his hand and seal the day and year first above written.

“CYRUS OBETZ.” [SEAL.]

It is alleged by the complaint that on the 5th of April, 1856, the plaintiff was an association organized and transacting business under certain articles, a copy of which was filed with the pleading, and that the bond and mortgage sued on were executed in accordance with the ordinary business transactions of that association; that Cyrus Obetz, the obligor of the bond, has failed to perform its conditions in this, that he did not pay his said monthly dues for the month of September, 1857, nor for any month since; but that said sum of two dollars on each of said shares of stock for each and every month since the month of August, 1857, with interest on the sum loaned, and all fines assessed against him, still remain unpaid. It is further alleged that on the 28th of September, 1857, the plaintiff, by a vote of her stockholders entered upon the record of their proceedings, adopted a certain law of this state approved March 5, 1857, entitled “an act for the incorporation and continuance of building loan fund and savings

associations"; and that, on the said 28th of September, she caused the aforesaid articles to be acknowledged by the president of her board of directors; and on the 13th of October then next following, she filed and caused to be recorded in the recorder's office of Marion County a copy of said articles so acknowledged, and also a duplicate thereof in the office of the secretary of state. And further, it is alleged that, on the 9th of February, 1857, the said Frederick Stein purchased of Obetz and wife, the mortgagors, all their interest in and to said mortgaged premises. Wherefore, the plaintiff prays judgment of foreclosure, etc. Cyrus and Sophia Obetz were defaulted. Frederick Stein and wife demurred to the complaint on the ground that it "does not state facts sufficient to constitute a cause of action"; but their demurrer was overruled, and they excepted.

The defendants Stein and wife answered by two paragraphs:—

1. That at the date of the mortgage the plaintiff was not a corporation, but an association composed of certain persons, who assumed the name of the plaintiff without authority of law; that the object of said association was to establish a fund of money to be loaned at exorbitant and usurious rates of interest for the benefit and profit of its members, and not for any lawful purpose whatever, but as a means of avoiding the statutes of this state against receiving or contracting for usurious interest, etc.

2. That on the 25th of September, 1855, Obetz subscribed for three shares of the capital stock of the aforesaid association, the same being for the sum of five hundred dollars each; that he afterwards, on the 31st of March, 1856, sold, assigned, and transferred upon the books of the association the said stock to the plaintiff, for the sum of \$400.50, and thereby divested himself of his character as a member of the association; but said mortgage and bond and articles of association require him, Obetz, to pay the association the full amount of said stock, viz., fifteen hundred dollars, in the manner stated in the mortgage, and also six per cent interest on said \$400.50, whereby the association has, in manner aforesaid, contracted for and reserved to itself an interest greater than the rate of six per cent, to wit, thirty per cent per annum; all of which was done knowingly and corruptly on the part of the plaintiff. And defendants say that Obetz and Stein, prior to the commencement of this suit, had paid to the plaintiff, as interest on said \$400.50, and as dues and fines on said three shares of

stock, \$190.30, which ought to be deducted from the amount of the mortgage. Wherefore, as to all of said mortgage, except the sum of two hundred dollars, and also the cost of suit, these defendants pray judgment, etc.

Plaintiff demurred to each paragraph of the answer. To the first the demurrer was sustained, but to the second it was overruled. Reply in denial of the second paragraph. The issues were submitted to a jury, who returned the following verdict: "We, the jury, find that there is due to the plaintiff, on the mortgage named in the complaint, of principal and interest, \$431.88, and that the payment of the same is secured by said mortgage on the lot therein described." Motion for a new trial denied, and judgment on the verdict, etc.

The rulings upon the demurrers are alleged to be erroneous in this: "That suits should have been instituted in the name of the individuals composing the association, and not in a corporate name; and that the complaint shows that at the time the bond and mortgage were executed the association was not incorporated." The latter clause of this position is, in point of fact, incorrect. The complaint does not show that the association, at the date of the contract, was not incorporated. It does not allege that the plaintiff was a corporation, nor was it necessary to do so: *Harris v. Muskingum etc. Co.*, 4 Blackf. 267 [29 Am. Dec. 372]; *Ferguson v. Indianapolis R. R.*, 13 Ind. 143. "If the style by which a party has contracted is such as is usual in creating corporations, viz., naming the ideality, but disclosing no individual, as is usual in the case of simple copartnerships," it has been held to imply a corporate existence. This is the rule of decision in this court:

*Muskingum Co.*, 4 Blackf. 267 [29 Am. Dec. 372];

*Anti Type Foundry*, 14 Ind. 89, and authorities

suppose the plaintiff had no corporate exist-

ence when the acts were executed, still, it must be

its corporate existence when this suit was in-

stment referred to in the com-

plaint that act provides for the

creation of a building loan fund and

an association, formed

by the members, in their corpora-

tion, and such association

is valid by this law; but they

were not acknowledged by

the court, and recorded in the



recorder's office of the county; and a duplicate thereof to be filed in the office of the secretary of state, etc.: Acts 1857, p. 75. The complaint very plainly shows that the association, prior to the institution of this suit, recognized the act to which we have just referred, and placed herself fully within its requirements. But the appellant insists that the enactment, so far as it relates to associations formed prior to its passage, is inoperative. We think otherwise. The law thus enacted affects only the remedy, does not vary liabilities; nor does it, in any degree, tend to divest vested rights. In its absence the suit could have been well brought in the names of the individual members of the association, hence the authority, given by the law, to sue in a corporate name, is a mere change in the mode of proceeding, which relates, alone, to the form of the remedy. The law in question is consistent with the constitution, and the legislature had power to enact it: *Graham v. State*, 7 Ind. 470; Smith's Com. 308, 389; *Aurora Co. v. Holthouse*, 7 Ind. 59; Ind. Dig. 270.

The defendants, Stein and wife, at the proper time, moved various instructions, to the effect that if the jury believed that if the payment of fines, dues, and interest made subsequent to the mortgage was intended to be for the use of money loaned upon the mortgage, they must find that the defendants, Stein and wife, are entitled to a credit to the full amount of fines, dues, and interest paid since the date of the mortgage. The instructions were refused, and defendants excepted. Against this ruling, it is assumed that the contract is usurious, and that therefore the court erred in refusing the instructions.

This position seems to be incorrect. As we have seen, the defendant Obetz, who was the mortgagor, was defaulted; Stein and wife alone appeared and defended. They were not parties to the mortgage; but had purchased the mortgaged premises. And the general rule is that "a vendee of real estate, who purchased, subject to a mortgage tainted with usury, cannot avail himself of that defense against a bill for foreclosure": *Stephens v. Muir*, 8 Ind. 352 [65 Am. Dec. 764]. The defense of usury is personal to the borrower and his heirs or representatives: *Campbell v. Johnston*, 4 Dana, 177. This exposition at once shows that the defendants, being the vendees merely of the mortgaged premises, had no right to set up usury in defense of the action, though the mortgage may include usurious interest: *Conwell v. Pumphrey*, 9 Ind. 135 [68 Am. Dec. 611].

And the result is, the court, in refusing the instructions, committed no error.

The judgment is affirmed, with five per cent damages and costs.

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**ALLEGATION OF CORPORATE EXISTENCE:** See *Holloway v. Memphis etc. R. Co.*, 76 Am. Dec. 68, note 71, where other cases are collected. When an ideality is referred to in a pleading by a name such as is usual in creating corporations, and which discloses no individuals, a corporate existence is implied, without being specially averred: *Johnson v. State*, 65 Ind. 206, citing the principal case.

**DEFENSE OF USURY IS PERSONAL:** See *Ladd v. Wiggin*, 69 Am. Dec. 551, note 559, where other cases are collected. One purchasing land subject to an incumbrance, cannot set up the defense of usury, whether there be an express promise by the purchaser to pay the incumbrance or not: *Price v. Pollock*, 47 Ind. 366; *Studabaker v. Marquardt*, 55 Id. 345; *Hill v. Minor*, 79 Id. 55, all citing the principal case.

**THE PRINCIPAL CASE IS ALSO CITED** in *McLaughlin v. Citizens' etc. Association*, 62 Ind. 271, to the point that the act incorporating and continuing building loan fund and savings associations is constitutional, and that the legislature had power to enact it.

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## WALPOLE v. ELLIOTT.

[18 INDIANA, 258.]

**LEGISLATURE MAY MAKE VOID ACT VALID BY CURATIVE STATUTE**, where it is not restrained by constitutional provisions; and it may therefore by such a statute validate the proceedings of a term of court holden without authority of law.

**APPEAL** from the Hancock circuit court. The opinion states the case.

*T. D. and R. L. Walpole*, for the appellant.

*D. S. Gooding*, for the appellee.

By Court, PERKINS, J. Suit upon a note. Judgment for the plaintiff. No question is presented by the record except this single one, viz., whether the judgment rendered in the cause is void. It is alleged that it was rendered at a special term of the Hancock circuit court, not held pursuant to law; but it is admitted that the legislature enacted in 1861, and before the appeal in the cause was taken, a curative statute, validating, if it could be done, the judgment rendered and proceedings had at that term.

The supreme court of this state decided in the following cases that it was competent for the legislature, by a curative

statute, where not restrained by a constitutional provision, to make a void thing valid: *Board of Commissioners v. Bright*, 13 Ind. 93; *Andrews v. Russell*, 7 Blackf. 474; *Grimes v. Doe*, 8 Id. 371; *Davis v. State Bank*, 7 Ind. 316; see also *Lucas v. Tucker*, 17 Id. 41. See Sedgwick on Stat. and Const. Law, pp. 198 et seq., for cases on this subject, and which sustains the ruling we make in the case at bar. Curative statutes are but a species of retrospective legislation; and retrospective legislation is valid where not forbidden by the constitution: See the cases collected in 1 Gavin & Hord's Statutes, p. 9, note 3; Ind. Dig. 751, sec. 96; Cushing's Law of Legislative Assemblies, p. 303, sec. 771. The following is the maxim governing the courts in determining whether a law is to be held prospective only, or retrospective also in its operation: *Leges quæ retrospectivæ raro, et magna cum cautione sunt adhibendæ; neque enim Janus locatur in legibus*. "Laws which are retrospective are rare, and to be received with great caution, for Janus should have no situation among the laws:" Taylor's Law Glossary, p. 288. See the cases cited in *Noel v. Ewing*, 9 Ind. 57.

The judgment is affirmed, with five per cent damages and costs.

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**POWER OF LEGISLATURE TO MAKE VOID PROCEEDINGS VALID:** See *Menges v. Dentler*, 75 Am. Dec. 616, note 621, where other cases are collected. The legislature may, by curative statutes, validate invalid proceedings: *Pries v. Huey*, 22 Ind. 26; *Sittin v. Board of Commissioners of Shelby County*, 66 Id. 121; *Gardner v. Haney*, 86 Id. 30; *Cookerly v. Duncan*, 87 Id. 334, all citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED IN *Henderson v. State*, 58 Ind. 248.

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## SHARP v. JONES.

[13 INDIANA, 314.]

**PURCHASER OF GOODS FROM FRAUDULENT VENDOR MAY HAVE LEGAL AND BENEFICIAL OWNERSHIP** therein, and may transfer it to a *bona fide* purchaser at any time before the creditors of the fraudulent vendor take steps to divest him of the property.

**AGENT WHO CONTRACTS IN HIS OWN NAME MAY SUE ON CONTRACT**, but where he contracts in the name of his principal, the latter must sue.

**TENDER OF SPECIFIC ARTICLE MUST BE OF SUCH ARTICLE**, in every material respect, as the contract under which it is made requires.

**APPEAL from the Howard common pleas.** The opinion states the case.

*N. R. Lindsay*, for the appellant.

*Thomas A. Hendricks*, for the appellee.

By Court, PERKINS, J. Suit for goods sold and delivered by Jones to Sharp. Complaint containing two paragraphs, one on a general, the other upon a special, contract of sale.

Answer in three paragraphs.

1. Denying that the plaintiff was the beneficial owner of the goods sold.

If the plaintiff was the owner of the goods through a sale to him by a fraudulent seller, still the legal and beneficial ownership might be in him, and might pass to a *bona fide* purchaser from him at any time before the creditors of the seller sought to divest him of the property. If the plaintiff was only the agent of the owner, and thus not possessed of the beneficial interest, still, as the contract of sale to Sharp was entered into by him (the plaintiff) in his own name, he could sue Sharp on the contract.

The code provides as follows:—

“Sec. 3. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.

“Sec. 4. An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. It shall not be necessary to make an idiot or lunatic a joint party with his guardian or committee, except as may be required by statute”: 2 R. S. 27.

Under this section, if an agent, for example, a carrier of goods, a factor, consignor, or consignee, etc., makes a contract, oral or written, in his own name, touching the subject of his agency, he can sue upon it.

But if he make the contract in the name of his principal, then the principal should sue; and he may sue where the contract is made in the name of his agent: *Swann's Pleading and Practice* (1861), pp. 83–85.

The two remaining paragraphs of the answer set up severally a tender.

The special contract upon which the goods were sold stipu-

lated that the purchaser Sharp was to transfer, in part payment of them, a note for a fraction over eight hundred dollars to Jones, the seller, which note was made by Henry Bell, of Baltimore, and according to the stipulation in the agreement, was "payable in cigars, at their real cost value in Baltimore;" and which note said Sharp was "to guarantee the payment of when presented."

The note set up in one paragraph as having been tendered in discharge of this agreement, was payable in cigars, not at their real cost value, but at a fixed price, viz., thirty dollars per thousand; and there was no special guaranty upon it of "payment when presented." It simply had on it Sharp's blank indorsement, which would not have rendered him liable upon the note in question, it not being commercial paper, on non-payment upon presentment in the manner that the special guaranty stipulated for would have done. The paragraph was bad.

The other paragraph averring a tender is a *felo de se*. It alleges a tender of the note, simply indorsed in blank, like the previous paragraph, and adds that before it was so tendered the defendant Sharp had presented it to Bell, at Baltimore, and demanded payment, and that payment had been refused, whereby, he alleges, it had become a cash note. This averment acknowledges the liability of Sharp, at the commencement of this suit, to pay Jones the price of the goods, either on the contract of sale, or on the note; because by Sharp's agreement he was to guarantee the payment of the note on demand; he had assumed to demand payment for Sharp before delivering the note; payment had been refused, he had notice of the refusal, and his liability on his agreement for the price of the goods, or the amount of the note, was complete. Having failed to guarantee the note as he agreed, Jones was not bound to accept it, and might go for the price of the goods. The recovery below by the plaintiff was right, and must be affirmed.

The judgment is affirmed, with five per cent damages and costs.

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**AGENT FAILING TO BIND HIS PRINCIPAL, WHEN BINDS HIMSELF:** See *Saborn v. Neal*, 77 Am. Dec. 502, note 507, where other cases are collected.

**TENDER OF SPECIFIC ARTICLES:** See *Deel v. Berry*, 73 Am. Dec. 236; *Spann v. Baltzell*, 46 Id. 346, note 366.

**PURCHASER FROM FRAUDULENT VENDOR, WHEN PROTECTED:** See *Newlin v. Osborne*, 72 Am. Dec. 566, note 568, where other cases are collected.

PRINCIPAL MAY SUE ON CONTRACT MADE BY AGENT WHEN: See *Cushing v. Rice*, 71 Am. Dec. 579, note 581, where other cases are collected.

AGENT MAY SUE IN HIS OWN NAME WHEN: See *Goodman v. Walker*, 68 Am. Dec. 134, note 142.

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## BLACK v. HERSCH.

[18 INDIANA, 342.]

IN ACTION AGAINST ATTORNEY FOR MONEY COLLECTED BY HIM and not paid over to his client, a demand must be alleged and proved, or circumstances that would dispense therewith.

APPEAL from the Carroll common pleas. The opinion states the case.

*J. B. Brown and James Park*, for the appellant.

By Court, HANNA, J. Suit by appellees, as partners, against appellant, as their attorney, for money collected and not paid over. No demand of the same before suit brought is alleged or proved. A demurrer to the complaint was overruled and the ruling excepted to. The demurrer was afterwards withdrawn and a general denial filed. The court instructed the jury that no demand before suit was necessary. On motion of the plaintiff, the interrogatory of the defendant, directed to Strans, inquiring whether he was a partner, or had any interest in said suit, was stricken out. A motion for a new trial and in arrest of judgment was overruled. Judgment for the plaintiff. The evidence is in the record.

Several errors are complained of. The ruling on demurrer was erroneous, because of the want of an averment of demand, but the error was avoided by the withdrawal of the demurrer. For the same reason the instruction was wrong, and the motion for a new trial should have prevailed for insufficiency of evidence, unless the proof of demand was avoided by the form of pleading. This we think was not so. It was not sufficient to show merely the collection, and that it was not paid, for the liability to the action did not arise upon such showing alone, without a demand, on account of circumstances that would dispense with the averment and proof of a special request.

The judgment is reversed, with costs. Cause remanded.

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DEMAND, NECESSITY OF, BEFORE ACTION: See *Nelson v. Bostwick*, 40 Am. Dec. 310, note 313, where other cases are collected. Money lawfully collected cannot be recovered back without a demand: *Headen v. Younglove*, 48 Ind. 213; *State v. Sims*, 76 Id. 329, both citing the principal case.

## CAMPBELL v. STATE.

[18 INDIANA, 875.]

IN ACTION ON FORFEITED RECOGNIZANCE, IT IS SUFFICIENT TO SET IT OUT IN *HÆC VERBA*. The recognizance need not be signed by the parties; it is witnessed by the record, and not by the signature of the party bound.

DEFENDANT IN CRIMINAL PROSECUTION MAY BE CALLED, AND HIS RECOGNIZANCE FORFEITED, while a motion for a new trial is pending.

DEFENDANT RECOGNIZED TO APPEAR AND ANSWER INDICTMENT, who is convicted thereunder of a lesser offense than that charged, is still bound to appear, abide the order of the court, and not depart without leave.

APPEAL from Fayette circuit court. The opinion states the case.

*John S. Reid* and *B. F. Claypool*, for the appellants.

*James C. McIntosh* and *Nelson Trusler*, for the appellee.

By Court, WORDEN, J. Action on a recognizance entered into by Campbell, Barkhizer, and McKinney, conditioned for the appearance of McKinney before the same court on, etc., to answer to an indictment preferred against him for rape, and that he would abide the judgment and orders of the court thereon, and not depart without leave.

McKinney was tried and acquitted of the alleged rape, but convicted of an assault and battery with intent to commit a rape. Pending a motion for a new trial in the cause, McKinney was called, and failing to appear, and his sureties failing to produce him, the recognizance was adjudged to be forfeited.

Process was returned not found as to McKinney, but Campbell and Barkhizer appeared and pleaded, and against them the state had judgment.

The complaint was demurred to, and it is objected that no copy of the recognizance is set out. The complaint sets out the recognizance *in hæc verba*, and that is sufficient. Again, it is objected that the recognizance is not signed or sealed by the defendants. This was not necessary. A recognizance is witnessed only by the record, and not by the seal or signature of the party bound: *Andress v. State*, 3 Blackf. 108. It is also urged that McKinney could not be called while his motion for a new trial was pending. No reason has been shown why this could not be legally done, and none occurs to us. It is also urged that as he was acquitted of the rape, he was not bound to appear any further to the cause. On an indictment for rape, a party may be acquitted of the rape, but convicted of an



assault and battery with intent to commit that offense: 2 R. S. 1852, p. 370, sec. 72. McKinney was bound to answer to the indictment, and also to abide the judgment thereon, and not depart without leave. Judgment might have been rendered against him on the conviction, and he forfeited the recognizance by absenting himself without having been discharged: *State v. Whitson*, 8 Blackf. 178.

The evidence sustains the finding, and there is no error in the record.

The judgment below is affirmed, with costs and one per cent damages.

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RECOGNIZANCE, REQUISITES OF: See *People v. Dennis*, 69 Am. Dec. 333, note 342, where other cases are collected. A recognizance taken in open court, and entered upon the order-book, is valid, without the signature or seal of any of the cognizors. It is witnessed by the record, and not by the signatures or seals: *State v. Elder*, 35 Ind. 371; *Grinstead v. State*, 53 Id. 264, both citing the principal case.

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## THOMPSON v. STATE. FRENCH v. STATE.

[18 INDIANA, 336.]

WHERE OWNER OF BUILDING BURGLARIZED HAS PREVIOUS NOTICE THAT CRIME IS TO BE COMMITTED, and makes no efforts to prevent the commission, but adopts means to secure the arrest of the burglar, the latter's liability to punishment is not thereby changed.

APPEAL from the Marion circuit court. The opinion states the case.

*J. McHenry*, for the appellants.

By Court, HANNA, J. Thompson and French were indicted jointly, but tried separately. The charge was burglary. The evidence showed that the proprietor and clerk of the store into which they entered were apprised of their intended crime by a person who was professing to act with them as a confederate, one Frost; that armed men were placed therein, who arrested the defendants; that the said proprietor was close at hand waiting for the said entrance; that they entered through an outside window and inner door that were opened by them or some one of them. As to who did the opening, the breaking, the evidence conflicted,—Frost stating that Thompson did it; French stating that the said Frost did it.

The court refused to instruct the jury "that if the breaking

and entering the house were done with the knowledge, procurement, and consent of the owner, you ought to find the defendant not guilty"; and did instruct that "in this case, the question of the guilt or innocence of the defendant on trial is not affected by the guilt or innocence of the witness Frost." There was a conviction.

We are referred to the case of *Regina v. Johnson*, 1 Car. & M. 218, 41 Eng. Com. L. 123. In that case, the servant of Drake, pretending to agree with the defendant, opened the door and let him in to commit the robbery. He was arrested before he did anything. The court held that it did not amount to a burglary, because the entry had been lawful, in consequence of the servant having opened the door.

In the cases at bar, there is nothing showing that the owner of the property consented to the commission of the crime, unless his remaining passive, so far as their contemplated proceedings were concerned, and failing to take any measures to prevent the breaking and entering, should receive that construction. The witness Frost was not his servant; he made no agreement with him by which he was to bring the defendants there. He merely arranged, and let Frost know that he had done so, for the arrest of the men "if they did break in to rob the store." He did not furnish the means by which they might enter. That entrance was by breaking. There was, therefore, no evidence tending to prove that the breaking and entering were by the procurement of the owner; and for that reason, the instruction asked was rightfully refused, and that given was proper.

It is clear from the above facts that the cases materially differ from the English case: 1. In the fact that Frost was not shown to have been in the employ of the owner of the property; 2. In the fact that the entry was not lawful, by the opening of a door by a servant, but forcible, by the breaking of a window by persons not authorized.

The judgment is affirmed.

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WRONGS DONE OR CRIMES COMMITTED BY AID OR CONNIVANCE OF PERSONS WHO WERE SEEKING TO ENTRAP AND CONVICT WRONG-DOER. — Courts will not, even to aid in detecting a supposed offender, countenance the violation of positive law, or any contrivances for inducing another to commit a crime. But when a party has formed a guilty intent to commit a crime, any person may furnish opportunities, or even lend assistance to the criminal, with the commendable purpose of exposing or punishing him. And the fact that there existed a plot to entrap him will not affect the criminality of his act or

render him any the less liable to punishment: 1 Bishop's Crim. Law, 7th ed., sec. 262; 1 Wharton's Crim. Law, sec. 149; *United States v. Whittier*, 5 Dill. 35; *Dodge v. Brittain*, Meigs, 84; *Rex v. Egginton*, 2 Bos. & P. 508; S. C., 2 Leach C. C. 913; *Regina v. Williams*, 1 Car. & K. 195; *Rex v. Ady*, 7 Car. & P. 140; S. C., 32 Eng. Com. L. 469; *Rex v. Holden*, Russ. & R. 154; S. C., 2 Taunt. 334; S. C., 2 Leach C. C. 1019; *Regina v. Johnson*, Car. & M. 218; *Regina v. Rathbone*, Id. 220; S. C., 2 Moody, 242; *Rex v. Dannelly*, Russ. & R. 310; *Rex v. Whittingham*, 2 Leach C. C. 912; *State v. Covington*, 2 Bail. 569. Chitty, in discussing this subject, says: "If the owner, in order to detect a number of men in the act of stealing, directs a servant to appear to encourage the design, and lead them on till the offense is complete, so long as he did not induce the original intent, but only provided for its discovery, after it was formed, the criminality of the thieves will not be destroyed": See also *Alexander v. State*, 12 Tex. 540.

The owner of property, who exposes it in expectation that it will be stolen by one whom he suspects to be a thief, is not thereby held to have consented to the unlawful taking of the property: 1 Bishop's Crim. Law, 7th ed., sec. 262; *Rex v. Hedge*, Russ. & R. 160; *Regina v. Lyons*, Car. & M. 217; *Pigg v. State*, 43 Tex. 108. Or if he marks property and places it in a position where it is stolen, and he afterwards identifies it in the possession of the thief, the latter will not be excused or be the less liable to punishment: 1 Bishop's Crim. Law, sec. 262; *Rex v. Hedge*, 2 Leach C. C. 1033; S. C., Russ. & R. 160; *Rex v. Whittingham*, 2 Leach C. C. 912; *Regina v. Williams*, 1 Car. & K. 195. In the case last cited, overtures were made by a person to the servant of a publican, to induce him to join in robbing his master's till. The servant communicated the matter to the master, and the former, by the direction of the latter, some weeks after, opened a communication with the person who had made the overtures, in consequence of which he came to the master's premises. The master having previously marked some money, by his direction it was placed upon the counter by the servant, in order that it might be taken by the party who had come for the purpose. It was so taken, and the offense was held to be larceny. The fact that facilities for committing an offense are afforded, or even that temptations to its commission are put in the way of the offender by one who is seeking to entrap him, will not affect the question of his guilt or relieve him from legal responsibility for the crime: 1 Bishop's Crim. Law, sec. 262; *Regina v. Lyons*, Car. & M. 217; *United States v. Foye*, 1 Curt. C. C. 364; *Rex v. Ady*, 7 Car. & P. 140; S. C., 32 Eng. Com. L. 469; *Dodge v. Brittain*, Meigs, 84. But if the prosecutor in setting the trap to ensnare the offender waives his legal rights, the prosecution will fall. If, for example, he surrenders absolutely his property in goods taken from him, he cannot sustain a prosecution for larceny or embezzlement; if he leaves his house door open, he cannot maintain burglary; and if he permit himself to be robbed, he cannot have the offender held for robbery: 1 Wharton's Crim. Law, sec. 149; *Rex v. Egginton*, 2 Bos. & P. 508; *Rex v. McDaniel*, Fost. 121; S. C., East P. C. 665; *Rex v. Fuller*, Russ. & R. 408; *State v. Covington*, 2 Bail. 569; *Alexander v. State*, 12 Tex. 540.

In the case of *People v. Collins*, 53 Cal. 185, the defendant requested one Parnell to enter a house in the night-time and steal therefrom a sum of money which he knew to be concealed there, the money to be divided between them. By the sheriff's advice Parnell agreed to do so, for the purpose of entrapping Collins, and accordingly entered the house, secured the money, marked it so that it could be identified, and after delivering it to Collins, gave a signal, when the sheriff arrested Collins with the money in his posses-

den. It was held that, inasmuch as Parnell alone entered the building, and did so without felonious intent, there was no burglary committed, and therefore Collins could not have been privy to a burglary. So in the case of *Allen v. State*, 40 Tex. 334, where the proof was that the prisoner proposed to a servant a plan of robbing his employer's office by night; that the servant disclosed the plan to his employer, by whom it was communicated to the police; that the master, acting under the instructions of the police, furnished the servant with the keys of the office on the appointed night; that the servant and the prisoner went together to the office, where the servant opened the door with the key, and they both entered through the door, and were arrested in the house by the police, it was held that the prisoner could not be convicted of burglary. Byrd, J., who delivered the opinion of the court in this case, said: "We are satisfied the prisoner is not guilty of the offense charged in the indictment, upon the evidence set out in the bill of exceptions. It is difficult to conceive how a person can be guilty of burglary who enters a house with a key voluntarily furnished him by the owner to enter, knowing at the time that the person wishes to enter to steal. It is in effect a consent to the entry by such person, and is not even a trespass." But in the case of *Rez v. Bigley*, 1 Craw. & D. 202, the prisoners were indicted for a burglary at the house of one Halpin. Halpin had been apprised of their purpose, and provided a force for their reception. On their knocking at the door, Halpin opened it, and thereupon the prisoners rushed in, locked the door, and were proceeding further into the house, when his men overpowered and secured them. It was contended that there was neither force nor fraud in the entrance, as the owner voluntarily, and without knowledge of their intention, had opened his door to the prisoners, so that a material ingredient in the crime of burglary was wanting. But the judges were unanimous that the offense was complete, and the indictment supported.

But where the prosecutor waives none of his rights, and simply aids an offender, or connives at his offense for the purpose of entrapping and convicting him of the crime, the nature or quality of the wrong-doer's offense will be in no wise affected.

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## PATTERSON v. PRIOR.

[18 INDIANA, 440.]

**CONVICTION AND SENTENCE OF PERSON TO PENITENTIARY BY COURT HAVING NO JURISDICTION** are nullities, and afford no protection to those who keep him in confinement; and those holding him in confinement are presumed to know the law, and that they have no legal right to keep him imprisoned.

**WHERE PERSON WHO ILLEGALLY IMPRISONS ANOTHER RECEIVES SOME BENEFIT** by reason of the latter's imprisonment, the person so imprisoned may waive the tort and sue upon the implied *assumpsit*; but if the person who illegally confined him received no benefit by reason of such confinement, there is no consideration to support an implied *assumpsit*.

**APPEAL** from the Clark circuit court. The opinion states the case.

*W. T. Otto*, for the appellants.

*R. Crawford*, for the appellee.

By Court, WORDEN, J. Suit by Prior against the appellants for work and labor. Judgment for the plaintiff.

The defendants pleaded separately the general denial, and some special defenses, to the latter of which demurrers were sustained. We deem it unnecessary to examine the special answers, as it seems to us that the substantial facts thus set up could have been given in evidence under the general denial. The cause was submitted to the court for trial on the following agreed statement of the facts, which was all the evidence given in the cause, viz.:—

“It is agreed in this case that the plaintiff, said James Prior, was imprisoned in the state prison, in the custody of said Miller, as warden thereof, under and by virtue of a judgment of the court of common pleas of Vanderburgh County, a certified copy of which judgment is filed with defendants’ answer. That during his confinement he did work and labor as a criminal; said work and labor were of the value of \$225; said Patterson during all the time of said Prior’s confinement in said state prison was the lessee thereof, and said work and labor were done by the order of said Miller, and said Patterson received all the benefit of said labor as such lessee. The time of said Prior’s confinement commenced on the 12th of September, 1853, and he was discharged therefrom, and ordered to be returned to the sheriff of Vanderburgh County upon a writ of *habeas corpus* by him sued out on the first day of January, 1855.”

The question as to the sufficiency of the evidence to sustain the finding was properly presented on a motion for a new trial.

The appellants assign errors separately.

At the time the appellee was convicted and sent to the penitentiary, the court of common pleas had no jurisdiction in that behalf; hence the conviction and judgment were nullities, and furnish the appellants no protection for the tort committed in confining him in the penitentiary: *Patterson v. Crawford*, 12 Ind. 241. The appellants must be presumed to have known the law, and that they had no legal right to imprison the appellee, or cause him to labor. That they may have been responsible to him in some form cannot be doubted. They undoubtedly committed a tort, and the question here is

whether the tort can be waived, and an action maintained on an implied *assumpsit*.

We will first examine this question so far as it relates to Patterson. He, it seems, was the lessee of the penitentiary and received all the benefit of the appellants' labor. He must be presumed to have assented to the performance of the labor, and being benefited thereby, the law implies a promise to pay what it is reasonably worth. It was held in *Patterson v. Crawford*, 12 Ind. 241, that where labor is performed for the benefit of a party, without an express contract, if he knows it and tacitly assents to it, he will be liable on an implied contract to pay a reasonable compensation therefor. In our opinion, so far as Patterson is concerned, the tort may be waived, and an action be maintained on the implied *assumpsit*. The case, however, is entirely different as to Miller, the warden of the penitentiary. He received no benefit of the plaintiff's labor, and not having been benefited, there is, as to him, no consideration to support an implied *assumpsit* to pay. The case of *Webster v. Drinkwater*, 5 Me. 319 [17 Am. Dec. 238], is much in point, where it was held that "the party committing a tort cannot be charged as upon an implied contract, the tort being waived unless some benefit has actually accrued to him."

The judgment against Miller is reversed, and against Patterson it is affirmed. Costs to be apportioned between Patterson and Prior, the appellee.

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IN THE CASE OF *Patterson v. Crawford*, 12 Ind. 241, cited in the principal case, one Armstrong was convicted by a court which had not jurisdiction of the offense, and was sentenced to the state prison, where he was confined at hard labor from June, 1853, until November, 1854, when he was released on *habeas corpus*. Armstrong assigned his account for the work and labor done during that time for the lessee of the prison, to Crawford, who brought suit against the lessee to recover the amount of the account. The court held that the assignment was good, and that Crawford could recover in his own name, against the lessee, as upon an implied contract, for work and labor done with his knowledge and at his request, although Armstrong, while a prisoner, was under the control of the warden of the prison.

WAIVING TORT TO SUE IN ASSUMPSIT: See *Balch v. Patten*, 71 Am. Dec. 526, note 527, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Belton v. Smith*, 45 Ind. 294, to the point that section 2116 of the revised statutes of 1843, was continued in force by section 802 of the code.

## SNOWDEN v. WILAS.

[19 INDIANA, 10.]

**UNCERTAINTY IS NOT GROUND OF DEMURRER, UNDER INDIANA CODE OF PROCEDURE, but of a motion to compel the party to make his pleading more certain, unless the pleading be so uncertain as not to state intelligibly a substantially good cause of action or defense.**

**LICENSE TO ENTER UPON AND OCCUPY LAND MUST BE SPECIALLY PLEADED, under the code, as well as at common law, or it cannot be given in evidence without consent, and consent will not be presumed.**

**RIGHT OF ONE TO OVERFLOW LAND OF ANOTHER IS EASEMENT, and an interest in real estate, and title thereto must be conveyed by grant, and established by proof of an actual grant, or of prescription, from which a grant will be inferred.**

**LICENSE TO DO ACT UPON LAND OF ANOTHER MAY BE GIVEN BY PAROL, if it does not involve an interest in real estate, or amount to an easement, and if coupled with an interest, especially if it be upon a consideration, it cannot be revoked.**

**FUTURE ENJOYMENT OF EXECUTED PAROL LICENSE, granted upon a consideration, or upon the faith of which money has been expended, will be enforced in equity, at all events, where adequate compensation in damages cannot be obtained; although, at law, a parol license is revocable as to future enjoyment, and is determined by a conveyance of the estate upon which it was to be enjoyed.**

**GRANTEES OF LAND ARE BOUND BY IRREVOCABLE LICENSE, when they purchase with notice; and in case of a mill and dam, the existing condition of things might be notice.**

**EQUITABLE RELIEF MAY BE GRANTED TO DEFENDANT IN LEGAL ACTION, in those states where law and equity are administered in the same court, if the pleadings present the necessary averments.**

**ACTION for damages. The facts are stated in the opinion.**

*D. O. Daily and L. P. Milligan, for the appellants.*

*John R. Coffroth, for the appellees.*

By Court, PERKINS, J. This was a suit by Wilas and others against Snowden and others, to recover for damage done by overflowing land by means of a mill-dam.

The defendants demurred to the complaint for uncertainty. The demurrer was overruled.

Uncertainty is not a ground of demurrer under the code; but is a ground for a motion to compel the plaintiff to make his pleading more certain. Nevertheless, if a pleading be so uncertain as not to state intelligibly a substantially good cause of action or defense, it will be subject to demurrer for not stating a cause of action or defense.

In the case at bar, we think the complaint was subject to a motion for uncertainty, in not describing with sufficient particularity the given piece of land overflowed, but that it was



not so uncertain as to be subject to a demurrer for not stating intelligibly a cause of action.

On the overruling of the demurrer, the defendants answered.

The answer contained the general denial and a special paragraph as follows:—

The defendants admit the erection of the dam, etc., but say that it was erected by Daniel Frenderburg, in connection with a flouring mill, the two costing thirteen thousand dollars; that before said Frenderberg erected the dam and mill, he applied to Moses Wilas, the then owner of the land overflowed, the land now owned by the plaintiffs, for license to erect said mill and dam; that Wilas gave the license by parol, and upon the consideration of fifty dollars in cash paid, and the fact that the mill would be an advantage to him, as well as to the whole neighborhood in which he lived; that the height of the dam was specified, being the exact height of that built and maintained; that since the dam and mill had been erected, Frenderberg had sold and conveyed the same to the defendants; and the plaintiffs had obtained title from Wilas to the land overflowed.

The defendants prayed that their right to maintain the dam at its present height might be established, etc.

The court sustained a demurrer on this paragraph of the answer; the cause was tried upon the general denial, and the plaintiffs obtained judgment for a portion over seventy dollars.

It is insisted by the appellees that this court should not examine the question arising upon the ruling of the court below in sustaining the demurrer, because, they say, the entire merits of the action may have been tried upon the general denial; but in this they are mistaken. Leave and license must, under the code, as well as common law, be specially pleaded, to be admissible in evidence, unless by consent. Consent will not be presumed, in the absence of all facts tending to show it: See 7 Blackf. 108, 373.

We come, then, to the question, Did the special paragraph of the answer contain facts constituting a bar to the action?

The right in one to overflow the land of another is an easement, an incorporeal hereditament, and it is an interest in real estate. Title to such easement is conveyed by grant, and established by proof of an actual grant, or by proof of prescription, from which a grant will be inferred. And if the mode of proof adopted be the showing of an actual grant, the grant must, at least, under the statute of frauds, be in writing, be by deed. This is the general rule in courts of law: *Moore v. Sinka*,

2 Ind. 257; *Bell v. Elliott*, 5 Blackf. 113: see *Postlethwaite v. Payne*, 8 Ind. 104; *Wickersham v. Bills*, Id. 387.

License, it may be here observed, to do an act upon the land of another, does not necessarily involve an interest in real estate, does not necessarily amount to an easement, and when it does not, it may be given by parol, and if coupled with an interest, especially if it be upon a consideration, it cannot be revoked. If one gives another license to go upon his land to shoot a single squirrel then existing and pointed out, that does not create an easement, and may be given by parol; and if the license go further, and include the right to take away, as the property of the licensee, the squirrel, when shot, it is coupled with an interest; and if given upon a consideration, at all events, it cannot be, at mere volition, revoked. But the right, in perpetuity, to one to hunt game upon a given tract of land of another, would be an easement, would involve an interest in real estate, and might be revocable under certain circumstances, if not under all, if given by parol. And, further, it may be remarked, licenses, whether revocable or not, excuse the licensee while acting under them, before revocation, and protect him from suits for acts done within the license: *Bell v. Elliott*, 5 Blackf. 113; *Miller v. Auburn & S. R'y Co.*, 6 Hill, 61; *Pierrepoint v. Barnard*, 6 N. Y. 279. Licenses cannot be revoked as to acts performed under them. The revocation is prospective, not retrospective: *Wallis v. Harrison*, 4 Mees. & W. 538.

Parol revocable licenses, it seems, also, are personal, cannot be assigned, and are determined without notice to the licensee by a conveyance of the property upon which they are to be executed: *Ruffey v. Henderson*, 8 Eng. L. & Eq. 305; 2 Am. Lead. Cas. 680; *Gronendyke v. Cramer*, 2 Ind. 382. Such are the principles which govern in courts of law.

But though a parol license, amounting in terms to an easement, is revocable as to future enjoyment at law, and is determined by a conveyance of the estate upon which it was to be enjoyed, this is not the rule in all cases in courts of equity. In these courts, the future enjoyment of an executed parol license, granted upon a consideration, or upon the faith of which money has been expended, will be enforced, at all events, where adequate compensation in damages could not be obtained. This will be done upon the two grounds of estoppel on account of fraud, and specific performance of a partly executed contract to prevent fraud. And in those states of the

Union where law and equity are administered in the same court, relief is afforded in any given suit where the pleadings present the necessary averments. And grantees, as well as the original parties, are bound, where they purchase with notice; and in a mill and dam, the existing condition of things might be notice to them of the equity: *Foster v. Browning*, 4 R. L. 47 [67 Am. Dec. 505]; *Lacy v. Arnett*, 33 Pa. St. 169; *McKellip v. McIlhenny*, 4 Watts, 317 [28 Am. Dec. 711]; *Herrick v. Kerr*, 2 Am. Lead. Cas. 676; Angell on Watercourses, 359; Browne on the Statute of Frauds, 32; 3 Kent's Com. 452 et seq. See *Kepley v. Taylor*, 1 Blackf. 412. Within these authorities the second paragraph of the answer in this cause was good.

Another question we suggest, but do not decide. When statutes authorize land to be taken for public use, as for railroads and canals, etc., and provide a form of remedy, that form must be adopted by the injured party: *Lafayette P. R. Co. v. New Albany R. R. Co.*, 13 Ind. 90 [74 Am. Dec. 246].

The taking of property for mill-dams is taking it for public use: *Hankins v. Lawrence*, 8 Blackf. 266.

The present statute of Indiana on the subject of assessment of damages for property taken or injured for public use includes public works and mill-dams, and gives to the party injured, against the party taking or injuring, the right of redress in the mode prescribed by the statute: 2 Gavin & Hord, p. 312, subd. 9, p. 316, sec. 710. Why, then, is not a person whose land is injured by a mill-dam not limited to the statutory mode of redress?

The judgment below is reversed, with costs; cause remanded for further action of the court below.

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UNCERTAINTY IS NOT GROUND OF DEMURRER, under the Indiana code of procedure, but of a motion to compel the party to make his pleading more certain, unless the pleading be so uncertain as not to state intelligibly a substantially good cause of action or defense: *Williamson v. Yingling*, 80 Ind. 383; *City of Connersville v. Connersville Hydraulic Co.*, 86 Id. 236; *Hart v. Crasford*, 41 Id. 199; *Lewis v. Edwards*, 44 Id. 336; *Williamson v. Yingling*, 93 Id. 44, all citing the principal case.

EASEMENT CANNOT BE CREATED BY PAROL: See *Hazelton v. Putnam*, 54 Am. Dec. 158, and note collecting prior cases; *Wynn v. Garland*, 68 Id. 190; *Fuhr v. Dean*, 69 Id. 484; *Hall v. McLeod*, 74 Id. 400.

REVOCABLE NATURE OF LICENSES: See *Hazelton v. Putnam*, 54 Am. Dec. 158, and note digesting cases in this series; also *Giles v. Simonds*, 77 Id. 373, and note collecting other decisions: *Burton v. Scherpf*, 79 Id. 717. A license is revocable: *Mansur v. Haughey*, 60 Ind. 368; but not as to acts done under

it; *Owens v. Lewis*, 46 Id. 519; *Schoonover v. Irwin*, 58 Id. 289; and a license coupled with an interest cannot be revoked: *Rogers v. Cox*, 96 Id. 158; so where a parol license is given, upon the faith of which money is expended by the licensee, the licensor is estopped from revoking the license, unless the licensee can be placed *in statu quo*: *Lane v. Miller*, 27 Id. 537; *Hodgson v. Jeffries*, 52 Id. 337; *Buchanan v. Logansport etc. R'y*, 71 Id. 267; *Test v. Larr*, 76 Id. 462; *Gilmore v. Hamilton*, 83 Id. 198; *Simons v. Morehouse*, 88 Id. 393, 394; *Strosser v. City of Fort Wayne*, 100 Id. 447; and see *Ogle v. Dill*, 61 Id. 442; *Conduitt v. Ross*, 102 Id. 169. The principal case is cited to the foregoing points; and see it cited in *Miller v. State*, 39 Id. 270, as very fully considering the power of revoking parol licenses.

GRANTEES OF LAND ARE BOUND BY IRREVOCABLE LICENSE when they purchase with notice: *Simons v. Morehouse*, 88 Ind. 395; *Stephens v. Benson*, 19 Id. 369; and in some cases the existing condition of things might be notice: Id.; both citing the principal case; see also *Prince v. Case*, 27 Am. Dec. 675, and note.

THE PRINCIPAL CASE IS ALSO CITED in *Hazlett v. Sinclair*, 76 Ind. 494, to the point that an easement is an interest in land; in *Simons v. Morehouse*, 88 Id. 393, to the point that a perpetual right of way over the land of another is an easement; as is the right of a mill-owner to pond-water on another's land, and of one owner to use another's land for a sluice-way, or for drainage purposes: *Brookville etc. Hydraulic Co. v. Butler*, 91 Id. 138; in *McCardle v. Barricklow*, 68 Id. 358, to the point that the use and enjoyment of what is claimed as an easement must have been adverse, under a claim of right, exclusive, continuous, and uninterrupted, besides being within the knowledge and acquiescence of the owner of the estate over which the easement is claimed; and in *Cool v. Peters Box etc. Co.*, 87 Id. 537, to the point that, as a general rule, a parol license is not assignable, because it is founded in personal confidence. It is further cited in *Lane v. Miller*, 22 Id. 105, as raising a question whether a party who is injured by the erection of a mill-dam should not be confined to the remedy given by statute; but see the opinion in this case; and it is referred to in *Keiper v. Klein*, 51 Id. 322, in considering the question whether a conveyance of land, on which stood a building, depending for its light and air on windows therein, which overlooked adjoining land of the grantor, included a right of light and air through such windows.

## JENKINS v. LONG.

[19 INDIANA, 28.]

FRAUD MUST BE SPECIALLY PLEADED UNDER CODE, although at common law it could be given in evidence under the general issue.

REPRESENTATION, TO BE FRAUDULENT, must be of a fact, and not an expression of opinion, must be false to a material extent, must be made under such circumstances that a party has a right to rely on it, and must be relied on.

ACTION on notes and a mortgage. The facts are stated in the opinion.

*John F. Kibbey*, for the appellants.

*M. Wilson*, for the appellees.

By Court, PERKINS, J. Suits upon notes and a mortgage.

Answer, that the notes were given for the purchase-money of a livery-stable, horses, carriages, etc., and the good-will of the stable; that the owners represented that the profits of the stable were from fifteen hundred to two thousand dollars a year; whereas, they aver that the business, instead of being from fifteen hundred to two thousand dollars a year, never cleared exceeding two hundred dollars.

To this answer a demurrer was sustained. It will be observed that the answer is uncertain in this, that it does not plainly appear whether the parties understood the representation to refer to gross receipts or net profits. A motion to have it made more certain might have prevailed.

If the representation was that the profits of the business had been, and then were, fifteen hundred dollars a year, and the representation was relied on in making the purchase, and it was false, it may have been such a one as amounted to fraud; because it was a representation of a fact, and not the expression of an opinion; whereas, had the representations been that the profits would amount in future to fifteen hundred dollars, it would not have been a fraud, because it would have been the expression of an opinion, and not the representation of an asserted existing fact: See Fry on Specific Performance, c. 12. The subject of fraud is most excellently treated in the second edition of Fry on Specific Performance. But the answer in the case at bar was bad, for failing to aver that the purchase was made in reliance upon the representation.

At common law, fraud could be given in evidence under the general issue, or under a general plea of fraud: *Cohee v. Cooper*, 8 Blackf. 115. But under the code, fraud must be specially pleaded; and the answer of fraud must contain the averments of all the elements necessary to be proved to make a fraud; and they are that the representation must go to a material fact; must be made under such circumstances that the party has a right to rely on it; the party must rely on it, and it must be false to a material extent. See the common-law forms of a special plea of fraud: 3 Ch. Pl. 962; 2 Swan's Pr. 742. See *Matlock v. Todd*, 19 Ind. 130.

The judgment is affirmed, with one per cent damages and costs.

**FRAUD MUST BE SPECIALLY PLEADED, UNDER CODE:** *Keller v. Johnson*, 71 Am. Dec. 355, and note. The principal case is cited to this effect in *Farmer v. Calvert*, 44 Ind. 212.

**ELEMENTS OF FRAUDULENT REPRESENTATION.**—The representation must be of a fact, and not of law, nor the expression of an opinion: *Clem v. Newcastle etc. R. R.*, 68 Am. Dec. 653; *Fulton v. Hood*, 75 Id. 664; *Parker v. Thomas*, post, p. 385; *Estep v. Larsh*, 21 Ind. 193; *Davis v. Jackson*, 22 Id. 234; *Arbuckle v. Biederman*, 94 Id. 174. It must be made for the purpose of inducing the other party to act: *Fogg v. Paw*, 71 Am. Dec. 662; *Page v. Parker*, 80 Id. 172; *Arbuckle v. Biederman*, supra. It must, of course, be false: *Campbell v. Hillman*, 61 Am. Dec. 195; *Watson Coal etc. Co. v. Casteel*, 68 Ind. 481; *Arbuckle v. Biederman*, supra. It must, at law, be made with a fraudulent intent: *Campbell v. Hillman*, supra; *Howard v. Gould*, 67 Am. Dec. 728; *Wintz v. Morrison*, Id. 658; *Henderson v. San Antonio etc. R. R.*, Id. 675; *Alvares v. Brannan*, 68 Id. 274; *Bunn v. Ahl*, 72 Id. 639; *Brown v. Manning*, 74 Id. 736; *Page v. Parker*, supra; *Estep v. Larsh*, supra; *Davis v. Jackson*, supra; *Watson Coal etc. Co. v. Casteel*, supra; *Arbuckle v. Biederman*, supra. It must be relied upon, but under such circumstances that the party had a right to rely: *Campbell v. Hillman*, supra; *McGar v. Williams*, 62 Am. Dec. 739; *Newcom v. Jackson*, 71 Id. 206; *Fulton v. Hood*, 75 Id. 664; *Bell v. Byerson*, 77 Id. 142; *Page v. Parker*, supra; *Parker v. Thomas*, post, p. 385; *Davis v. Jackson*, supra; *Hess v. Young*, 59 Ind. 384; *Watson Coal etc. Co. v. Casteel*, supra; *Arbuckle v. Biederman*, supra. And finally, it must be material: *McGar v. Williams*, supra; *Bigby v. Powell*, 71 Am. Dec. 168; *Keller v. Johnson*, Id. 355; *Brown v. Manning*, 74 Id. 736; *Fulton v. Hood*, supra; *Page v. Parker*, supra; *State ex rel. Cartwright v. Holmes*, 69 Ind. 591. The principal case is cited in the foregoing Indiana cases.

## ROCHE v. WASHINGTON.

[19 INDIANA, 53.]

**TRIBE OF NORTH AMERICAN INDIANS DOES NOT CONSTITUTE NATION**, so that its laws will be recognized in a state, by international comity.

**STATE IS NOT BOUND BY INTERNATIONAL COMITY TO GIVE EFFECT TO LAWS OF ANOTHER STATE**, which are repugnant to the laws and policy of the former.

**MARRIAGE, ACCORDING TO JUS GENTIUM, IS UNION OF ONE MAN AND ONE WOMAN**, so long as they both shall live, to the exclusion of all others, by an obligation, which, during that time, the parties cannot, of their own volition and act, dissolve, but which can be dissolved only by the state.

**VALIDITY OF MARRIAGE BETWEEN INDIANS IS TO BE TESTED BY LAW OF STATE** in which it is contracted, and not by the customs of the tribe, which had removed beyond the limits of the state.

**SUIT for partition.** The opinion states the facts.

*John R. Coffroth*, for the appellant.

*L. P. Milligan*, for the appellee.

By Court, PERKINS, J. Suit for partition, instituted by Francis Washington against John Roche. Partition adjudged. Motion for a new trial overruled. Commissioners report partition. Report confirmed. New trial denied. Appeal to this court.

The cause was decided upon the following agreed case:—

“It is hereby agreed, by the parties to this action, that the following are the facts of the case: The land in question, of which partition is prayed, was the property of La-ka-ko-quah, *alias* Jane Richardville, who died seised of the same in 1857, leaving no children, nor father or mother, but leaving her husband, as hereinafter stated, whose name is George Washington, and her sister, Catharine Richardville, her brother, Snap Richardville, and Francis Washington, the plaintiff, who is an only son of her sister, Ah-tah-pe-tah-neah, deceased. It is further agreed that the defendant, John Roche, has the title of George Washington, Catharine, and Snap Richardville, conveyed to him since the decease of the said Jane Richardville. It is further agreed that all of the foregoing persons, except the defendant, are, or were, Miami Indians.

“It is further agreed that in the year 1844, the said George Washington, according to the manner and custom of marriage in said Miami tribe of Indians, was duly married to Le-quah, a Miami Indian, with whom he lived, residing in Huntington County, Indiana, where a part of the said Miami tribe then and since have resided; that in the year 1846, the said George Washington and the said Le-quah, according to the manner and custom of divorce in said Miami tribe, were duly divorced; that in the same year, 1846, said Le-quah removed to Kansas Territory, where she has since resided, and now resides; that afterward, in the year 1847, said George Washington, according to the custom of said tribe of Indians, was married to the said Ah-tah-pe-tah-neah, who departed this life in 1852, leaving said Francis Washington, her only surviving child; that afterward, in 1853, said George Washington, according to the custom of said Indian tribe, was married to said La-ka-ko-quah, *alias* Jane Richardville, and that the two lived together, and cohabited as man and wife till her death, at the county of Huntington, in 1857, she dying childless.

“It is further agreed that the Indian custom of marriage requires no ceremony further than the agreement of the parties to live together as husband and wife; the agreement being consummated by living and cohabiting together as such.



"It is further agreed that the Indian custom of divorce requires no special form of proceeding, other than that the parties disagree, and by consent separate, the mother usually taking care of and receiving the annual payment of the government to the children; and that the said customs of marriage and divorce are the ancient, immemorially continued, and present existing customs among all of said tribe of Indians, and the law thereof; and that the same have continued to exist, as their customs and laws, from a period beyond the memory of man.

"J. R. COFFROTH, Attorney for Defendant.

"L. P. MILLIGAN, Attorney for Plaintiff."

The question intended to be presented for our decision in this cause is, whether the courts of Indiana will hold valid, as marriages, such unions, and as divorces, such separations, as those described in the agreed statement of facts, they having been made under, and being sanctioned by the laws of the Miami tribe of Indians.

It is claimed that, by the law of nations, the courts of Indiana must uphold Indian marriages. The law of nations, or international law, is mainly of modern origin, growing out of increased commercial and social intercourse, and exists only among civilized states: 1 Kent's Com. 1. It is very properly divided by late writers into public and private. Public, that which regulates the political intercourse of nations with each other. Private, that which regulates the comity of states in giving effect, in one, to the municipal laws of another, relating to private persons, their contracts, etc.

The first question to be decided is, then, Does a tribe of North American Indians constitute a state? We think not. A state has been defined to be "a people permanently occupying a fixed territory, bound together by common laws, habits, and customs [or by a constitution], into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into international relations with other communities": See 10 New Am. Cyclop. 360; Wheaton's Law of Nations, 53, 54; 1 Kent's Com. 188, 189. But few of the particulars enumerated as constituting a state exist in a tribe of North American Indians. See, however, *Cherokee Nation v. Georgia*, 5 Pet. 1. This the court judicially takes notice of as matter of general historical knowledge: the Indians are not

educated above the condition of nomadic pastoral tribes, if up to it; neither, were these tribes conceded to be states or nations in the political or international sense of the terms, are they civilized.

Civilization, it is true, is a term which covers several states of society; it is relative, and has not a fixed sense; but in all its applications it is limited to a state of society above that existing among the Indians of whom we are speaking. It implies an improved and progressive condition of the people, living under an organized government, with systematized labor, individual ownership of the soil, individual accumulations of property, humane and somewhat cultivated manners and customs, the institution of the family, with well-defined and respected domestic and social relations, institutions of learning, intellectual activity, etc. We know, historically, that the North American Indians are classed as savage, and not as civilized people; and that, in fact, it is problematical whether they are susceptible of civilization.

But let it be admitted that the Miami tribe of Indians constitutes an international political state, and that it is a civilized one, still the state of Indiana is not bound by international comity to give effect in her courts to all the laws and customs of such state; but only to such as are not repugnant to her own laws and policy: *Doe v. Collins*, 1 Ind. 24.

Laws giving effect to contracts of marriage are not repugnant to the laws of Indiana; and the proposition is established as a general one, in private international law, that an actual marriage, valid in the country where celebrated, will, not as upon a claim of right, but by courtesy, be given effect to in other states, though not celebrated by the forms nor evidenced in the mode prescribed for marriages in such other states. If, then, in the case at bar, an actual marriage took place between Jane Richardville and George Washington, there could be no objection to its being upheld in the courts of this state, though celebrated among an uncivilized tribe of Indians.

What, then, constitutes the thing called a marriage? What is it in the eye of the *jus gentium*? It is the union of one man and one woman, "so long as they both shall live," to the exclusion of all others, by an obligation which, during that time, the parties cannot, of their own volition and act, dissolve, but which can be dissolved only by authority of the state. Nothing short of this is a marriage. And nothing short of this is meant when it is said that marriages, valid where

made, will be upheld in other states: *Noel v. Ewing*, 9 Ind. 37; Story's Conflict of Laws, c. 5; Wheaton's Laws of Nations, 137; see *Reynolds v. Reynolds*, 3 Allen, 605. From what has been said, it is manifest that the union between Jane and George, described in the statement of facts in the case at bar, was not a marriage, according to the law of any civilized nation, but simply and exactly a contract and state of concubinage: See Cobb on Slavery, 245, note 4; *State v. Samuel*, 2 Dev. & B. 177. But suppose the union had been such as to constitute marriage, according to the *jus gentium*, and which the courts of this state would have upheld as such, it might not still have followed, as a consequence, that the husband would have inherited from the wife her real estate. The marriage is one thing, and the incidents, the legal rights, and consequences attaching upon marriage are another; and these may be different as to real and personal property: 2 Kent's Com. 93 et seq. Marriage in different countries is followed by different property rights. In the Miami nation, or tribe of Indians, marriage, supposing we concede their unions of sexes to be such, is not followed by a right in either party by the law of the tribe to inherit real estate from the other; for the Indians, by their laws, neither in their tribal capacity nor individually, owned any real estate. It is a kind of property unknown to them. They simply hold vaguely defined territory for use in hunting, fishing, etc., and they never assumed to and could not convey the fee to any one. That belonged, first, to Great Britain as the discovering nation, and to the United States afterward, by succession to Great Britain; and it is under our laws only that any individual among these Indians ever obtained, conveyed, or inherited real estate: See *Fellows v. Denniston*, 23 N. Y. 420; *Cherokee Nation v. Georgia*, 5 Pet. 1. This is the doctrine of international law held by civilized states, and acted upon without consulting the Indians. It is based or justified on the ground that the Indians never cultivated the soil. But the case does not turn on any of the foregoing points, and they need not, therefore, be regarded as decided. See, on the general subject, *Dale v. Irish*, 2 Barb. 639; *Wall v. Williamson*, 8 Ala. 48; *Wall v. Williams*, 11 Id. 826; and *Brashear v. Williams*, 10 Id. 630; also *Jones v. Laney*, 2 Tex. 342; and the cases in the supreme court of the United States, cited in Cushing's Digest, 240.

A treaty, however, we may remark, may be made between a government and an association of persons not constituting

an independent government. The constitution of the United States authorizes our government to treat with foreign nations, and to regulate affairs with states and Indian tribes. We know, as a part of the law of the land, and the history of our state, that the last treaty between the Miami tribe of Indians, located in Indiana, and the United States, was in 1840; that the tribe then agreed to remove from Indiana to west of the Mississippi River; that in 1846 the agreement was executed, the chiefs at that time extinguishing their council-fires upon the Wabash, and accompanied by most of the living members of their tribe, departing for their newly assigned and distant home. The sovereignty of the tribe, so far as it possessed sovereignty, its jurisdictional power, so far as it possessed such over persons and property in Indiana, disappeared with the light of its council-fires, and departed to the new seat of the tribe.

Now, it is true, as a general proposition, that the laws of a nation are operative only within the limits of the territory over which the jurisdiction of the nation extends. They do not, as a general proposition, follow the individuals of such nation into the jurisdictional limits of another nation, so as to attach to acts done in such other nation. Hence, if citizens of Great Britain, of China, or of Africa, contract marriage in Indiana, that contract, to be valid, must conform to the laws of Indiana: 1 Bright on Husband and Wife, 8; 1 Greenl. Ev., sec. 545. For exceptions to the general proposition above stated, see Wheaton's Law of Nations, 3d ed., 132. The marriage in the case at bar was contracted in Indiana, between Miami Indians who did not accompany the tribe to the West, but remained to live among our people; and it was contracted after all territorial jurisdiction of the tribe had ceased in the state, and after the tribe itself, with its government, had disappeared from our borders. The marriage, therefore, was clearly to be tested by the law of Indiana; certainly so, when it came in question in our own tribunals.

The judgment below is affirmed, with costs.

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**MARRIAGES BY LAW OF NATURE:** See *Johnson v. Johnson's Adm'r*, 77 Am. Dec. 596, and note thereto.

**MARRIAGE IS VALID EVERYWHERE,** when valid according to the law or custom of the place where it is contracted: *True v. Ranney*, 53 Am. Dec. 164, and note collecting prior cases; *Hiram v. Pierce*, 71 Id. 555; *Johnson v. Johnson's Adm'r*, 77 Id. 598.

THE PRINCIPAL CASE IS CITED IN *Beard v. Beard*, 21 Ind. 328, to the point that a state cannot give its laws or jurisdiction an extraterritorial operation upon citizens or property of another state; and in *Wiseman v. Wiseman*, 73 Id. 114, to the point that in the absence of a statutory regulation, no length of time or absence, nothing but death or the decree of a court confessedly competent to try the case, can dissolve the marital tie; but it is distinguished in *Me-shing-go-me-sia v. State*, 36 Id. 315, in that the right of a state to tax the lands and other property of Indians residing on and owning such lands, under treaties with the United States, was not and could not have been determined in it.

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## POLK v. STATE.

[19 INDIANA, 170.]

JURY MUST HAVE REASONABLE DOUBT WHETHER ACCUSED PURPOSELY AND MALICIOUSLY COMMITTED CRIME, in a prosecution for murder, if, upon the whole evidence in the cause, they have a reasonable doubt whether he was sane when he committed the act.

INDICTMENT for murder. The facts are stated in the opinion.

*John M. La Rue and R. C. Gregory*, for the appellant.

*John L. Miller*, prosecuting attorney, and *Orth and Stein*, for the state.

By Court, PERKINS, J. James Polk was indicted for the murder of John Stewart, convicted of murder in the second degree, and sentenced for twenty years to the state prison. On the trial the court charged the jury as follows:—

“Insanity is insisted upon as a defense in this cause. Where the mental faculties are so deranged as to render the party incapable of distinguishing between right and wrong, the law will not hold him criminally liable for his acts while in such state. This, however, is a defense which must be made out by the defendant, and must be proved to your satisfaction by a preponderance of evidence.”

The case turns, in this court, upon the correctness of the above charge.

Crimes, *malum in se*, consist in acts done, and intentions with which they are done: *Dennison v. State*, 13 Ind. 510; *Keely v. State*, 14 Id. 36. Murder in the second degree consists: 1. In the act of killing a human being; 2. In purpose (intention) and malice in the killing. These two facts must exist to constitute the crime; and in a given case, if there is a reasonable doubt of the existence of either fact, the defendant must be acquitted; but as purpose, intention, malice, are mental, are states of an intelligent mind, they cannot, either

of them, exist where the mind is deranged, is unsound, in the technical sense of the word,—in short, is insane. Hence, the definition of murder, always and everywhere, has been the killing of a human being by a person of sound mind, etc.

The same rule of law applies as to both these facts; that is, that the jury must be satisfied of their existence beyond a reasonable doubt.

If, therefore, upon the whole evidence in the cause, the jury have a reasonable doubt whether the accused, upon trial, was sane when he committed the homicide or act charged against him, they must have a reasonable doubt whether he purposely and maliciously committed the act; and hence, a reasonable doubt whether he committed the crime defined by statute.

The rule of proof in these cases is settled in this state: *Hall v. State*, 8 Ind. 439; *French v. State*, 12 Id. 670 [74 Am. Dec. 229]. The rule in New York accords: *People v. McCann*, 16 N. Y. 58 [69 Am. Dec. 642].

The judgment is reversed, with costs. Cause remanded for another trial.

HANNA, J., delivered a dissenting opinion.

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INSANITY AS DEFENSE TO CRIME: See *McAllister v. State*, 52 Am. Dec. 180, and note collecting prior cases; *Carter v. State*, 62 Id. 539; *People v. McCann*, 69 Id. 642; *People v. Rogers*, 72 Id. 484; *State v. Bartlett*, 80 Id. 154; and see the principal case cited in *McDougal v. State*, 88 Ind. 27, to the effect that it must appear from the evidence beyond a reasonable doubt, that at the time of the commission of the crime, the mental condition of the defendant was such that he was capable of forming an intent. The principal case is also cited in *King v. State*, 9 Tex. App. 554, to the point that it is error for the court to charge the jury that the burden of proving insanity is upon the defendant.

THE PRINCIPAL CASE IS CITED in *Binns v. State*, 46 Ind. 312, to the point that if the jury have a reasonable doubt as to whether the defendant was at the place where the crime was committed, at the time of its commission, they should find him not guilty; and see *Whelchell v. State*, 23 Id. 91.

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## NEWKIRK v. NEILD.

[19 INDIANA, 194.]

BREACH OF AGREEMENT TO FORBEAR TO BRING SUIT UPON NOTE FOR REASONABLE TIME cannot be made available by way of counterclaim.

ACTION upon a promissory note. The facts are stated in the opinion.

*Thomas L. Smith and M. C. Kerr*, for the appellants.

*J. and A. B. Collins*, for the appellee.

By Court, WORDEN, J. Action by Neild against the appellants upon a promissory note.

The defendants filed an answer of four paragraphs, to three of which a demurrer was sustained. Issue on the other paragraph; trial; finding and judgment for the plaintiff.

The case comes before us on the ruling of the court sustaining the demurrer to the three paragraphs of the answer. These paragraphs need not be here copied, as the questions presented by them are properly stated in the following excerpt from the brief of counsel for the appellants: "The questions intended to be raised by these pleadings are, whether, after a note has become due, an agreement between the parties for a new and valuable consideration received by the payee, that the latter will forbear to bring suit upon it for a reasonable time thereafter, can be made available either as a plea in abatement or in bar in an action upon the note, or by way of counterclaim." The counsel for the appellants do not contend that the matter can be made available in abatement or bar. That it cannot, would seem to be settled by the following cases in this court: *Mendenhall v. Lenwell*, 5 Blackf. 125 [33 Am. Dec. 458]; *Clark v. Snelling*, 1 Ind. 382; *Thalman v. Barbour*, 5 Id. 178.

But, as is well remarked by counsel for the appellants, these decisions are not based upon the proposition that such an agreement is invalid, or that it is wholly nugatory, but upon the ground that it is an independent contract. Therefore, if broken, an action may be maintained upon it, although its breach is not an answer to a complaint upon the note. Hence, it is insisted that inasmuch as a breach of the agreement furnishes a right of action, it can be made available as a defense, by way of counterclaim to a suit upon the note.

But we are of opinion that such defense cannot be made available by way of counterclaim. Admitting that such matter arises out of or is connected with the cause of action, and might be the subject of an action in favor of the defendant, so as to come within the definition of a counterclaim, still there was no breach of contract, or such right of action, at the time of the commencement of the suit.

Where the bringing of an action is the breach of an agreement, but where such breach is no bar to the action, it seems to us that such breach is no defense by way of counterclaim, as no such defense existed at the time the suit was brought. But were this not so, there is another reason why the judg-



ment in this case must be affirmed. The facts set up entitle the defendants, at most, to but nominal damages. The substantial damages for a breach of such an agreement would be the enforcement of collection before the stipulated time. The simple commencement of a suit would, to be sure, be a technical breach of the agreement not to sue; but until such suit was prosecuted to final judgment, the damages could be but nominal, and for nominal damages a judgment will not be reversed: *Tate v. Booe*, 9 Ind. 13.

The judgment below is affirmed, with costs, and one per cent damages.

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**BREACH OF AGREEMENT NOT TO SUE FOR LIMITED TIME CANNOT BE PLEADED IN BAR TO ACTION WITHIN THAT TIME**, although the agreement be founded on a sufficient consideration: *Mills v. Todd*, 83 Ind. 28; *Williams v. Scott*, Id. 44; the only remedy is an action for damages for breach of the agreement: *Williams v. Scott*, *supra*. The principal case is cited to the foregoing. And see *Mendenhall v. Lemnell*, 33 Am. Dec. 458.

**FORBEARANCE TO SUE, AS CONSIDERATION FOR PROMISE**: See *Prater v. Miller*, 60 Am. Dec. 521, and note discussing the question.

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## PARKER v. THOMAS.

[19 INDIANA, 212.]

**FALSE REPRESENTATION BY AGENT OF CORPORATION AS TO ITS RIGHTS UNDER CHARTER ARE INSUFFICIENT TO AVOID CONTRACT OF SUBSCRIPTION** to its capital stock. The representation is upon matter of law.

**FALSE REPRESENTATIONS WILL NOT AVOID CONTRACT OF SUBSCRIPTION TO CAPITAL STOCK OF RAILROAD COMPANY** when they are in respect to such matters as the ability of the company to construct the road, and the time within which it would be done.

**FALSE REPRESENTATIONS WILL NOT AVOID CONTRACT OF SUBSCRIPTION TO CAPITAL STOCK OF CORPORATION**, unless the subscriber believed or relied upon them, or his subscription was in some degree induced by them.

**CONDITION IN SUBSCRIPTION TO CAPITAL STOCK OF RAILROAD COMPANY THAT ROAD SHOULD BE LOCATED** within a certain distance of a specified place, is a condition precedent; and its performance is not waived by the giving of unconditional notes for the subscription, unless so intended by the parties.

**DEMURRER IS TO BE TAKEN DISTRIBUTIVELY**, and is equivalent to a separate demurrer filed to each paragraph, and may therefore be overruled as to part, and sustained as to part, of the paragraphs, where an answer consists of several paragraphs, and a single demurrer is filed thereto, in which it is said that "the plaintiff demurs to each paragraph of the answer," etc.

**ACTION upon promissory notes.** The opinion states the facts.

*B. W. Wilson*, for the appellant.

*James Gavin, Oscar B. Hord, and Cortes Ewing*, for the appellee.

By Court, WORDEN, J. This was an action by Parker against Thomas, upon promissory notes executed by the latter to the Fort Wayne and Southern Railroad Company, and by the company indorsed to the plaintiff. The notes bear date December 29, 1853.

The defendant answered in four paragraphs, in substance as follows:—

1. That on the — day of August, 1853, he subscribed for sixteen shares of the capital stock of the railroad company, on the following conditional subscription, viz.: "We, the undersigned, promise to pay to the president and directors of the Fort Wayne and Southern Railroad Company twenty-five dollars for each share of stock set opposite our names, as follows, to wit: four per cent in sixty days, and the balance in six semiannual payments, provided that said road is located within one fourth of a mile of the plat of the town of Westport, in Decatur County, Indiana; and when said road is so located, we authorize the agents of the company to transfer our names and stock into the regular stock-book of the company"; that afterward, on the 9th of December, 1853, he paid the four per cent on the subscription, and gave his notes for the balance, which are the notes now sued upon; that at the date of the subscription of the stock, and of the execution of the notes, he was a resident of Decatur County, and the owner of real estate therein, and desirous of having the road located and constructed through said county; that the charter of the company contains the following provision [here follows a provision in the charter of the company which it is unnecessary to set out in this opinion]; that the company, through her agents and servants, in order to induce the execution of the subscription and the notes, falsely, etc., represented that the company had a right to construct a railroad from Muncietown to Jeffersonville, passing through Rushville, Greensburgh, and Westport, in Decatur County, Vernon, in Jennings County, thence to Jeffersonville; and that said towns of Rushville, Greensburgh, Vernon, and Jeffersonville had been fixed upon as the route, and that these had been determined upon as the points through which the road would pass, and that Jeffersonville had been fixed upon as the southern terminus of the

road, by a resolution of the board of directors; that said representations were false, and known to be so by the agents and servants of the company; that by the charter of the company she had no right to locate and construct a road from Muncietown to Jeffersonville; that on the 5th of October, 1853, the company fixed upon and located the southern terminus of the road at Columbus, in Bartholomew County, by a resolution of her board of directors, which resolution is set out; that said defendant, at the time, etc., was ignorant of such location, which would make it impossible for the company to make Greensburgh and Westport points, and Jeffersonville the southern terminus, in accordance with the representations; also, that there never was a legal location of the southern terminus of the road at Jeffersonville.

2. That the defendant subscribed for stock and gave the notes as set forth in the first paragraph; that the company, by her agents and servants, in order to induce the execution of the notes, falsely, etc., represented to the defendant in a public speech made at the Methodist church in Westport, that the company was amply able to build the road; that she had stock already subscribed sufficient to do so; and that the final completion within three years was a fixed fact; that the stock would pay heavy dividends, and be the best investment the defendant and others present at the meeting could make; that the subscription in Decatur County should be used in the construction of the road through that county only, and would not be called for until the work was progressing; that if the people of Decatur County would subscribe a small amount more to make up their quota the middle division would be put under contract during the coming winter,—all of which representations were false, and known to be so by said agents and servants; that at the time, etc., the defendant lived in a secluded and retired portion of the county, and was ignorant of the means and prospects of the company; that at the time, etc., the company had not the means to construct the road, and is now insolvent, and has abandoned the construction of the road.

3. That at and prior to the time of the subscription the defendant was the owner of a large amount of real and personal property, at and near the town of Westport, and engaged in the mercantile business at said town, which property would be greatly enhanced in value, and which business would be greatly improved and promoted by the construction of a rail-

road through or near said town; that about the time of the subscription, the company caused her agents to go over said county of Decatur, among the people, in different directions, which agents falsely and fraudulently represented that the railroad passing through, etc., near said town of Westport, would be speedily constructed, if the people of the county of Decatur would take hold and subscribe stock to take the same through said county; that the company had ample means to construct and furnish the road already subscribed; that it would be finally completed in three years; that it would be, in a very short time, located and put under contract from Muncie, in Delaware, to Vernon, in Jennings County; that said agents held meetings in Westport and other places in the county, which defendant attended, where said agents repeated, in the strongest terms, the aforesaid false representations as to the ability of the company to construct and put in operation their road, and that she would forthwith proceed to locate and put the same in operation between said points; by means of which, etc., the public was excited and amazed, and made to believe that the company had the ability and would so locate and construct the road. The defendant, relying on said false representations and believing the same to be true, subscribed to the capital stock of the company, as set forth in the first paragraph of the answer. And afterward, on, etc., the said company, by her agents, repeating said false representations, and representing that it would be to the interest of the company to close up said subscription by giving a note for the amount thereof, and would not injure the defendant, as the company had ample means and would immediately go to work and locate, and let the work on the central division of the road, and construct the road, as soon as the same could be done, with reasonable diligence; and that the same would be complete, within three years, within one fourth of a mile of said town of Westport, according to the conditions of the subscriptions, and that, if the defendant and others did not close up their subscriptions, the books of the company would be closed, and they would not be permitted to take said stock; and that the notes, when given, would be applied exclusively to the construction of the road through said county of Decatur,—the defendant, relying upon all of said false and fraudulent representations, and believing the same to be true, made and executed the notes on which the suit is brought, for no other or different consideration; that the company has not located

or constructed the road within one fourth of a mile from Westport, nor at any other place within or through said county; that the said company had not, at the time when, etc., nor has it yet, the means subscribed to construct said road, but has been and is insolvent; all of which representations were false, and known to be so by said agents when they were made.

4. That the defendant was the owner of property, and engaged in the mercantile business, as in the last paragraph set forth; that in order to aid in the construction of the road which was to run through or near said town of Westport, he made the conditional subscription set out in the first paragraph; that afterward, on the 1st of December, 1853, the company, by her agents, falsely and fraudulently represented that she was amply able to go on and locate and construct said road, and complete the same in three years, and that she was about to and would forthwith proceed to construct the same through the county of Decatur, and within one fourth of a mile of Westport, according to the terms of the subscription; and that to enable her to do so, it was important and necessary, and that it would be better, that said defendant should give his notes for the amount of his subscription, that the same might be applied to the construction of the road through said county;—and the defendant, confiding in these representations, and believing them to be true, and being ignorant of the facts, executed the notes described in the complaint; that the company has not yet located or constructed her road within one fourth of a mile of the plat of the town of Westport, or at any other point near said town, and at the time was not about to proceed, etc.; that said company was at said time entirely unable to construct said road, etc.; that she had not the means to construct the same, and that she has since wholly abandoned said route; that she has not performed any work thereon between the town of Muncie, in Delaware County, and Vernon, in Jennings County, and does not intend to do so; that at the time of making the false representations, the company had no intention of locating or constructing her road within one fourth of a mile of the town of Westport, or at any other point running through said county, but knowing that unless said defendant could be induced to believe that the road would be speedily located and constructed, and that the company had the means to locate and construct the same as aforesaid, he would not give his said notes, the company made said false and fraudulent representations to deceive and defraud him; wherefore, etc.

A demurrer was overruled to each paragraph of this answer, and the plaintiff excepted. Issues were formed and tried, resulting in a verdict and judgment for the defendant.

Were the several paragraphs of the answer good? This is the question that first claims our attention.

The allegation in the first paragraph, that the company falsely represented that she had a right to construct a road from Muncie to Jeffersonville, adds nothing to the other facts therein stated. That representation was upon matter of law. Whether the company had such right depended upon her charter, which was a public law, and of which the defendant was bound to take notice.

The other allegations in the several paragraphs of representations in respect to the ability of the company to construct the road, and the time within which it would be done, etc., are not sufficient to avoid the contract. The case of *Bish v. Bradford*, 17 Ind. 490, is decisive upon these questions.

The first paragraph alleges that the company had, by resolution, fixed upon Columbus, in Bartholomew County, as the southern terminus of the road, thereby rendering it impossible to make Greensburgh and Westport points, etc.

The third alleges that the company had not located or constructed the road within a fourth of a mile of Westport, etc.

The same allegation is to be found in the fourth. Outside of these allegations none of the paragraphs set up matter which is a valid defense.

The second paragraph is clearly bad, for the double reason that the representations are not such as to bar the action, and it is not alleged that the defendant believed them, or relied upon them, or that his subscription was in any degree induced by them.

Returning now to the first, third, and fourth paragraphs, the question arises, whether they were good, in consequence of the allegations denying the location of the road as provided for by the terms of the subscription. The original subscription was upon the condition that the road should be located within one fourth of a mile of the plat of the town of Westport. This, we think, was a condition precedent: *Taylor v. Fletcher*, 15 Ind. 81. Had the suit been upon the subscription, it is clear enough on general principles that no recovery could be had without showing that the road been located as provided for in the subscription. Did the giving of the notes waive the condition? The notes were six in number, and un-

conditional, each for the amount of the semiannual installments, and coming due semiannually, corresponding with the terms of the subscription. In this respect, the case differs materially from that of *Evansville, I., & C. R. R. Co. v. Dunn*, 17 Id. 603. We are not prepared to say that the giving of the notes waived the condition. No doubt, if it was the intention of the parties to waive the condition, effect should be given to such intention; but the facts as shown do not of themselves amount to such waiver. It seems to follow that the paragraphs, except the second, were good.

Should the cause be reversed because of the overruling of the demurrer to the second paragraph? Here arises a question of practice. The demurrer was as follows: "The plaintiff demurs to each paragraph of the answer," etc. The appellee insists that the demurrer was properly overruled if there were any good paragraphs. We think, however, that the demurrer should be taken distributively, and that it is equivalent to a separate demurrer filed to each paragraph. It might well be overruled as to some and sustained as to other paragraphs. It is not like a demurrer that must be wholly sustained or overruled.

If the evidence is not to be deemed in the record, and counsel for the appellee claim that it is not, then the judgment must be reversed for the error in respect to the second paragraph, for in that case we cannot say that the verdict for the defendant was not based upon the defense set up in that paragraph; we cannot say that the merits of the cause have been fairly tried and determined: *Rose v. Wallace*, 11 Ind. 112. A bill of exceptions sets out evidence, but the thirtieth rule may not be strictly complied with. If we take it that the evidence is all in the record, it shows that the road was located as provided for in the subscription. That it was not so located, we have seen, was the only valid defense set up. This defense, the proof in the record shows, did not exist. If the evidence be deemed in the record, a motion for a new trial, which was properly made, should have been sustained. So that, whether the evidence be or be not in the record, the judgment must be reversed.

A cross-error is assigned. The plaintiff, for a reply to the alleged location of the southern terminus of the road at Columbus, etc., alleged that afterward, by a resolution of the board of directors, the company rescinded the former order, and ordered that the road be located on a line passing through



Greensburgh, Westport, and other points, terminating at Jeffersonville, etc. To this replication the defendant demurred, but the demurrer was overruled, and the defendant excepted. It is claimed that herein the court erred. The position assumed is, that as the company had power by her charter to fix upon the southern terminus of her road, and had exercised that power by fixing it at Columbus, the power was exhausted and the location could not be changed. Whatever might be the law, where no statutory authority is given to make a change, we think the charter of the company gave her the right to make such change. The thirty-first section of the charter seems, by necessary implication, to confer the right to make such change: Local Acts 1849, p. 355.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

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THE PRINCIPAL CASE, as it again came before the court, is reported in *Parker v. Thomas*, 28 Ind. 277.

DEMURRER OPERATES DISTRIBUTIVELY, AS SEPARATE DEMURRER TO EACH PARAGRAPH, where it is a single demurrer, but purports to be filed to "each" of several paragraphs of a complaint or other pleading: *Frankboner v. Frankboner*, 20 Ind. 65; *Aiken v. Bruen*, 21 Id. 140; *Silvers v. Junction R. R.*, 43 Id. 443; *Washington Township v. Bonney*, 45 Id. 79; *Rennick v. Chandler*, 59 Id. 360; and see *Perkins v. Wright*, 37 Id. 28, all citing the principal case.

SUBSCRIPTIONS TO CORPORATE STOCK — DISTINCTION BETWEEN SUBSCRIPTIONS PROPER AND OFFERS AND AGREEMENTS TO SUBSCRIBE. — A distinction should be observed at the commencement of this discussion between true and proper subscriptions to corporate stock on the one side, whether made before or after incorporation, and mere offers and mutual agreements to subscribe for shares in corporations to be thereafter formed, on the other. The rights and liabilities resulting in these various cases are plainly very different. If parties mutually agree to subscribe for shares in a corporation to be formed in the future, there is no unconditional agreement to become share-holders as soon as the corporation is formed, but it is contemplated that the parties shall perform the additional act of executing the statutory contract of membership by subscription upon the stock-books, before they shall become share-holders. In such a case, there is no offer which the corporation, when formed, can accept, and the parties do not become stockholders, and liable to be charged as such, unless they carry out their agreement by subscribing for the shares: *Morawetz on Private Corporations*, 2d ed., sec. 49; *Lake Ontario Shore R. R. v. Curtiss*, 80 N. Y. 219; *Thrasher v. Pike County R. R.*, 25 Ill. 393; *Quick v. Lemon*, 105 Id. 578, 585; *Mt. Sterling Coal Road Co. v. Little*, 14 Bush, 429; *Strasburg R. R. v. Echternacht*, 21 Pa. St. 220; S. C., 60 Am. Dec. 49. Such a mutual agreement, however, may be binding as a contract, and incapable of revocation. And since the contract is made for the benefit of the corporation, although it is not a party to it, the corporation, upon the general principles of contracts governing such cases, should be allowed to sue upon it and recover damages for its breach: See *Thrasher v. Pike County R. R.*, *Quick v. Lemon*, *Mt. Sterling Coal Road Co. v. Little*, *supra*; compare *Strasburg R. R. v. Echternacht*, *Lake Ontario Shore R. R. v. Curtiss*, *supra*.

An offer to become a share-holder, on the other hand, may, as in the case of offers generally, be revoked before acceptance: 1 Morawetz on Private Corporations, sec. 50; *Stuart v. Valley R. R.*, 32 Gratt. 147; *Goff v. Winchester College*, 6 Bush, 443; but the offer becomes binding when accepted: See *McClure v. People's Freight R'y*, 90 Pa. St. 269. Although "no particular form of acceptance is essential in order to constitute this proposition to become a share-holder a binding contract, there must be some unequivocal act on the part of the agents having authority to accept the offer, so that there can be no doubt as to the obligation of the corporation as well as of the subscriber": 1 Morawetz on Private Corporations, sec. 48; *Parker v. Northern Central etc. R. R.*, 33 Mich. 23; *Northern Central etc. R. R. v. Eslow*, 40 Id. 222.

In case, however, of the ordinary stock subscription allowed by law for the purpose of effecting the organization of a corporation, the subscribers become stockholders when all the conditions precedent prescribed by the law have been complied with: 1 Morawetz on Private Corporations, sec. 56; and see *Selma etc. R. R. v. Tipton*, 5 Ala. 787; S. C., 39 Am. Dec. 344; *New Albany etc. R. R. v. McCormick*, 10 Ind. 499; S. C., 71 Am. Dec. 337; *Instone v. Frankfort Bridge Co.*, 2 Bibb, 576; S. C., 5 Am. Dec. 638; *Waukon etc. R. R. v. Dwyer*, 49 Iowa, 121; *Wight v. Shelby R. R.*, 16 B. Mon. 4; S. C., 63 Am. Dec. 522; *Penobscot R. R. v. White*, 41 Me. 512; S. C., 66 Am. Dec. 257; *Penobscot R. R. v. Dummer*, 40 Me. 172; S. C., 63 Am. Dec. 654; *Thigpen v. Mississippi Central R. R.*, 32 Miss. 347; *Spear v. Crawford*, 14 Wend. 20; S. C., 28 Am. Dec. 513; *Burrall v. Bushnick R. R.*, 75 N. Y. 211; *Buffalo etc. R. R. v. Dudley*, 14 Id. 337; *Milford etc. T. Co. v. Brush*, 10 Ohio, 111; S. C., 36 Am. Dec. 78; *East Tennessee etc. R. R. v. Gammon*, 5 Sneed, 567; *Mobile etc. R. R. v. Yandal*, Id. 294; *Connecticut etc. R. R. v. Bailey*, 24 Vt. 465; S. C., 58 Am. Dec. 181. The advantages and rights which the subscriber derives from being a member of the corporation are said to constitute the consideration for the engagement of the subscriber, and to make a binding contract: Boone on Corporations, sec. 108; *Instone v. Frankfort Bridge Co.*; *Selma etc. R. R. v. Tipton*; *Thigpen v. Mississippi Central R. R.*; *East Tennessee etc. R. R. v. Gammon*, *supra*. Some of the foregoing cases seem to consider that the subscription should be accepted by the corporation, but this is unnecessary and not required: 1 Morawetz on Private Corporations, sec. 56. But it is held that a subscription made after the corporation is organized does not become binding, nor constitute the subscriber a share-holder, until it is accepted by the corporation: *Carlisle v. Saginaw Valley etc. R. R.*, 27 Mich. 318; *Parker v. Northern Central etc. R. R.*, 33 Id. 23; *Northern Central etc. R. R. v. Eslow*, 40 Id. 222; compare *Buscy v. Hooper*, 35 Md. 15; S. C., 6 Am. Rep. 350. In *St. Paul etc. R. R. v. Robbins*, 23 Minn. 439, it was held that mere subscription to "preferred" capital stock, after the organization of the company, while it constituted a valid contract on the part of the company to issue the stock to the subscriber upon his paying for it, and on his part to pay for it, did not give him an interest in the company, nor vest in him the title to the stock.

In this connection, the difference should also be noticed between sales of shares and subscriptions: See 1 Morawetz on Private Corporations, sec. 61. Thus where a contractor agreed with a company to construct its road, and accept in part payment a certain amount of its capital stock, the agreement is not a subscription: *New York etc. R. R. v. Hunt*, 39 Conn. 75; compare *Ridgefield etc. R. R. v. Brush*, 43 Id. 86.

**CORPORATION'S RIGHT OF ACTION AGAINST DELINQUENT SUBSCRIBER.** — It is a general rule that the subscription to corporate stock of itself imposes upon the subscriber an obligation to pay installments or assessments; and an

action may be maintained by the corporation against a delinquent subscriber upon this implied promise, although the remedy of forfeiture, or sale of the stock, is given to the corporation by charter or general statute: *Boone on Corporations*, secs. 108, 119; *Beene v. Cahaba etc. R. R.*, 3 Ala. 660; *Selma etc. R. R. v. Tipton*, 5 Id. 787; S. C., 39 Am. Dec. 344; *Hartford etc. R. R. v. Kennedy*, 12 Conn. 499; *Danbury etc. R. R. v. Wilson*, 22 Id. 435; *Hightower v. Thornton*, 8 Ga. 486; S. C., 52 Am. Dec. 412; *Instone v. Frankfort Bridge Co.*, 2 Bibb, 576; S. C., 5 Am. Dec. 638; *Fry v. Lexington etc. R. R.*, 2 Met. (Ky.) 322; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Busey v. Hooper*, 35 Id. 15; S. C., 6 Am. Rep. 350; *Kennebec etc. R. R. v. Jarvis*, 34 Md. 360; *Penobscot etc. R. R. v. Dunn*, 39 Id. 587; *Buffalo etc. R. R. v. Dudley*, 14 N. Y. 338; *Lake Ontario etc. R. R. v. Mason*, 16 Id. 451; *Rensselaer etc. Plank Road Co. v. Barton*, Id. 457, note; *Northern R. R. v. Miller*, 10 Barb. 260; *Ogdensburg etc. R. R. v. Frost*, 21 Id. 541; *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, Id. 65; *Hawley v. Upton*, 102 Id. 314. The remedies of forfeiture, and of sale of the stock, are simply cumulative. It has, however, been held in a few states that unless the subscriber has expressly promised to pay, no action can be maintained against him to recover the amount of his unpaid installments or assessments: *Andover Turnpike Corp. v. Gould*, 6 Mass. 40; S. C., 4 Am. Dec. 80; *New Bedford T. Corp. v. Adams*, 8 Mass. 138; S. C., 5 Am. Dec. 81; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Mechanics' Foundry etc. Co. v. Hall*, 121 Id. 272; *Connecticut etc. R. R. v. Bailey*, 24 Vt. 465; S. C., 58 Am. Dec. 181. In New Hampshire, resort must first be had to a sale of the shares before an action at law can be maintained: *New Hampshire Central R. R. v. Johnson*, 30 N. H. 390. And in New York, according to an early case, a provision for the forfeiture of shares subscribed takes away the right of action: *Jenkins v. Union Turnpike Road*, 1 Caines Cas. 86; but the action could be maintained if he had promised to pay, notwithstanding the remedy of forfeiture or sale given by charter or statute: *Goshen etc. Turnpike Road v. Hurtin*, 9 Johns. 217; *Dutchess Cotton Man. v. Davis*, 14 Id. 238; S. C., 7 Am. Dec. 459; *Worcester Turnpike Corp. v. Willard*, 5 Mass. 80; S. C., 4 Am. Dec. 39; *Taunton Turnpike Corp. v. Whiting*, 10 Mass. 327; S. C., 6 Am. Dec. 124; *White Mountains R. R. v. Eastman*, 34 N. H. 124; but see the later New York decisions cited *supra*, under the general rule; and see *Piscataqua Ferry Co. v. Jones*, 39 Id. 491.

No notice from a corporation is necessary before an action can be brought upon a subscription to its stock: *New Albany etc. R. R. v. McCormick*, 10 Ind. 499; S. C., 71 Am. Dec. 337; *Johnson v. Crawfordville etc. R. R.*, 11 Ind. 280; although if the law requires notice as a condition precedent to actions for installments of stock, and there is no waiver of the condition, notice, as required, must be given: *Heaton v. Cincinnati etc. R. R.*, 16 Id. 275; S. C., 79 Am. Dec. 430, 434; and if, by the terms of the subscription, the subscriber agrees to pay "all charges and assessments regularly levied or assessed," the company can only recover the price after assessment or call: *Gross Isle Hotel Co. v. I'Anson's Ex'rs*, 43 N. J. L. 442.

It is not necessary that the corporation should have issued or offered to issue certificates of stock to the subscriber before it can maintain an action against him upon his subscription: *Fulgam v. Macon etc. R. R.*, 44 Ga. 597; *South Georgia etc. R. R. v. Ayres*, 56 Id. 230; *New Albany etc. R. R. v. McCormick*, 10 Ind. 499; S. C., 71 Am. Dec. 337; *Heaton v. Cincinnati etc. R. R.*, 16 Ind. 275; S. C., 79 Am. Dec. 430; and see *Mitchell v. Beckman*, 64 Cal. 117; *Schaeffer v. Missouri Home Ins. Co.*, 46 Mo. 248, 250; *Burr v. Wilcox*, 22 N. Y. 551. A certificate is merely evidence of the stockholder's right. But a tender of a

certificate is necessary before the corporation can sue upon the contract of subscription, when the payment is made by the contract conditional upon the delivery of the certificate: *Cowtright v. Deeds*, 37 Iowa, 503; and where a party, after the organization of a corporation, subscribed to its "preferred" capital stock, it was held that the implied promise of the company to issue the stock, and of the subscriber to pay for it, were concurrent and dependent, and an action by the company upon the subscription could not be maintained unless the company had issued or offered to issue the stock: *St. Paul etc. R. R. v. Robbins*, 23 Minn. 439; but the action can be maintained without a delivery or tender of the stock, if the action is to recover, not the whole price, but installments due: *Minneapolis Harvester Works v. Libby*, 24 Id. 327.

**GENERAL FORM OF SUBSCRIPTION — HOW MADE.** — The form of the subscription is immaterial, if the intent of the parties can be collected from the writing: 1 Morawetz on Private Corporations, sec. 69; *Nulton v. Clayton*, 54 Iowa, 425; S. O., 37 Am. Rep. 213; *Monterey etc. R. R. v. Hildreth*, 53 Cal. 123; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294. Thus in the first of these cases, a writing, reciting an association for the purpose of organizing a bank, and stating, among other things, "the names and residences of the shareholders, with the number of shares held by each," and subscribed by the incorporators, was held to constitute a subscription to the capital stock on the part of the signers. A subscription by a partnership name is a sufficient compliance with an act which requires a subscriber to articles of incorporation to subscribe thereto "his name, place of residence, and amount by him subscribed": *Ogdensburgh etc. R. R. v. Frost*, 21 Barb. 541. A subscription, it is held, cannot be delivered as an escrow, to commissioners appointed to receive subscriptions, to take effect only on a specified condition, but the subscription is absolute, and the non-performance of the condition is no defense: *Wight v. Shelby R. R.*, 16 B. Mon. 4; S. O., 63 Am. Dec. 522.

Nor is it necessary to the validity of a subscription that it should be made in a book for that purpose: Boone on Corporations, sec. 108; *Hamilton etc. Plank Road Co. v. Rice*, 7 Barb. 157; *Ashtabula etc. R. R. v. Smith*, 15 Ohio St. 328; *Stuart v. Valley R. R.*, 32 Gratt. 146. Thus in *Woodruff v. McDonald*, 33 Ark. 97, subscriptions were made on a loose sheet of paper, which was put in a bound book used as a record of the company, and the contents of this paper, with the names of the subscribers and amounts subscribed, were entered in the book by the commissioners appointed to open books of subscription, and this was held a sufficient subscription; and again it is decided that where a subscription is made in a small blank-book, and is afterwards accepted by the corporation, it is not necessary that the same should be transferred to the stock-books of the company: *Brownlee v. Ohio etc. R. R.*, 18 Ind. 68. But of course, if a charter or general statute requires the subscription to be made in a certain form or manner, the subscription must be so made, to be binding: See *Shurts v. Schoolcraft etc. R. R.*, 9 Mich. 269; *Carlisle v. Saginaw etc. R. R.*, 27 Id. 315; *Parker v. Northern Central etc. R. R.*, 33 Id. 23; *Northern Central etc. R. R. v. Eslow*, 40 Id. 422.

A signature to an incomplete paper, wanting in any substantial particular, will, however, not be binding upon the signer without further assent on his part to the completion of the instrument: *Dutchess etc. R. R. v. Mabbett*, 58 N. Y. 397; but if he leaves the amount of his subscription blank, he may impliedly authorize those empowered to take subscriptions to fill up the blank: *Jewell v. Rock River Paper Co.*, 101 Ill. 57.

Irregularities merely, and not substantial defects in the subscription, will

not avoid it. Thus where the legislature provides that the form of the subscription shall be with the "president, managers, and company," the contract is valid although the word "president" be omitted: *Hagerstown T. Road Co. v. Creeger*, 5 Har. & J. 122; S. C., 9 Am. Dec. 495; and see the cases, *supra*, this head. And a subscriber will be deemed to have waived all objection to the form of his subscription, where, after making it, he acts as a stockholder, and as such accepts the office of director: *Lane v. Brainerd*, 30 Conn. 565.

The construction of a contract of subscription is for the court: *Monadnock R. R. v. Felt*, 52 N. H. 379. Where no place of performance is mentioned in a contract made in one state to subscribe to shares of stock of a railroad corporation established by the laws of another state, and having its road and treasury there, the contract is to be performed in the latter state, and is to be construed by the laws thereof: *Penobscot etc. R. R. v. Bartlett*, 12 Gray, 244; S. C., 71 Am. Dec. 753.

It has been held that a subscription may be made payable in goods: *Searight v. Payne*, 6 Lea, 283; and see *post*, "Payment of Deposit as Essential to Validity of Subscription"; but in Ohio it is held that as against creditors of the company, a subscriber cannot avail himself of the benefit of a collateral agreement by which his subscription was to be paid otherwise than in money: *Henry v. Vermillion etc. R. R.*, 17 Ohio, 187; *Noble v. Callender*, 20 Ohio St. 199.

**SUBSCRIPTION TO BE IN WRITING — PAROL EVIDENCE TO VARY SUBSCRIPTION.** — The authorities seem to agree that subscriptions to corporate stock must be in writing: Boone on Corporations, sec. 108; 1 Morawetz on Private Corporations, sec. 77; *Pittsburgh etc. R. R. v. Gazzam*, 32 Pa. St. 340; *Pittsburgh etc. R. R. v. Clarke*, 29 Id. 146, 152; *Fanning v. Insurance Co.*, 37 Ohio St. 339; S. C., 41 Am. Rep. 517; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 189. And the general rule which prevents a written contract from being varied or contradicted by parol applies. The terms of a subscription cannot, therefore, be varied by parol evidence of a special agreement made prior to or contemporaneous with the subscription: *Smith v. Tallapoosa etc. Plank Road Co.*, 30 Ala. 650; *Ridgefield etc. R. R. v. Brush*, 43 Conn. 86; *Martin v. Pensacola etc. R. R.*, 8 Fla. 370; S. C., 73 Am. Dec. 713; *New Albany etc. R. R. v. Fields*, 10 Ind. 187; *Evansville etc. R. R. v. Posey*, 12 Id. 363; *Thigpen v. Mississippi Central R. R.*, 32 Miss. 347; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *McClure v. People's Freight R'y*, 90 Pa. St. 269; *Cunningham v. Edgefield R. R.*, 2 Head, 23; as to show that the subscription was made on a condition: *Fairfield Co. T. Co. v. Thorp*, 13 Conn. 173; *Wight v. Shelby R. R.*, 16 B. Mon. 4; S. C., 63 Am. Dec. 522; *Kennebec etc. R. R. v. Waters*, 34 Mo. 369; *North Carolina R. R. v. Leach*, 4 Jones L. 340; *Miller v. Hanover etc. R. R.*, 87 Pa. St. 95; S. C., 30 Am. Rep. 349. But undoubtedly, explanatory parol evidence is admissible: *Johnson v. Wabash etc. Plank Road Co.*, 16 Ind. 389; *Sodus Bay etc. R. R. v. Hamlin*, 24 Hun, 390; *Greer v. Chartier's R'y*, 96 Pa. St. 391; S. C., 42 Am. Rep. 548. And in an action on a subscription to corporate stock, it is competent for the defendant to show by parol, in the absence of record evidence, that the subscription list upon which his name appeared was annulled and abandoned, and that another subscription was subsequently opened: *Southern Hotel Co. v. Newman*, 30 Mo. 118. A memorandum added to the formal subscription is presumed to have been made at the time of the subscription, in the absence of evidence to the contrary: *Robinson v. Pittsburgh etc. R. R.*, 32 Pa. St. 334; S. C., 72 Am. Dec. 792.

**WHAT AGENTS CAN RECEIVE SUBSCRIPTIONS.** — If the charter or general law under which a corporation is formed provides that subscriptions for

shares shall be received by agents of a particular class, no other agents can bind the company or subscribers by receiving subscriptions: 1 *Morawetz on Private Corporations*, sec. 64; *Shurtz v. Schoolcraft etc. R. R.*, 9 Mich. 269; *Parker v. Northern Central etc. R. R.*, 33 Id. 23; *Northern Central etc. R. R. v. Eslow*, 40 Id. 422. But if a subscription is not binding, merely because it was received by an agent who had no authority from the corporation to receive it, the want of authority may be cured by a subsequent ratification: *Walker v. Mobile etc. R. R.*, 34 Miss. 245; *Mobile etc. R. R. v. Yandal*, 5 Sneed, 294. In *Crocker v. Crane*, 21 Wend. 211, S. C., 34 Am. Dec. 228, it was held that receiving subscriptions of stock was a ministerial act, under a statute authorizing commissioners to take subscriptions and subsequently to distribute the stock, and such act might be performed by an agent or deputy, or by any one without authority whose act is afterwards ratified by the commissioners.

NO ONE IS BOUND BY SUBSCRIPTION unless he himself executed the contract, or authorized an agent to do it for him: *Coyote G. & S. M. Co. v. Ruble*, 8 Or. 284; *McClelland v. Whitley*, 15 Fed. Rep. 322; but of course, a subscription in the name of a third person is an act capable of ratification: *McCully v. Pittsburgh etc. R. R.*, 32 Pa. St. 25; *Philadelphia etc. R. R. v. Cowell*, 28 Id. 329. A person cannot himself be held as a subscriber to corporate stock, where he makes the subscription without authority in the name of another, although he may be otherwise liable: *Salem Mill-dam Corporation v. Ropes*, 9 Pick. 187; S. C., 19 Am. Dec. 363; *contra: State v. Smith*, 48 Vt. 266, where it is said that he would bind himself and become the equitable owner of the stock.

PAYMENT OF DEPOSIT AS ESSENTIAL TO VALIDITY OF SUBSCRIPTION. — Charters and general incorporation laws frequently require subscribers to corporate stock to pay a certain sum upon each share at the time of subscription, and the question has arisen as to the effect of such a provision upon subscriptions if the sum be not paid. It has been held, in the first place, that the payment is not a condition precedent to the incorporation or organization of the company: *Smith v. Tallassee etc. Plank Road Co.*, 30 Ala. 650; *Mitchell v. Rome R. R.*, 17 Ga. 574. And the rule is also maintained that non-payment will not vitiate the subscription: *Illinois River R. R. v. Zimmer*, 20 Ill. 654, 657; *Goodrich v. Reynolds*, 31 Id. 490, 496; *Wight v. Shelby R. R.*, 16 B. Mon. 4; S. C., 63 Am. Dec. 522; *Vicksburg etc. R. R. v. McKean*, 12 La. Ann. 638; *Minneapolis etc. R'y v. Bassett*, 20 Minn. 535; S. C., 18 Am. Rep. 376; *Henry v. Vermillion etc. R. R.*, 17 Ohio, 187; *Stuart v. Valley R. R.*, 32 Gratt. 146; *Pittsburgh etc. R. R. v. Applegate*, 21 W. Va. 172. It has, however, been held by other cases that payment was a condition precedent to make the subscription binding: *Hibernia T. Corp. v. Henderson*, 8 Serg. & R. 219; S. C., 11 Am. Dec. 593; *Fiser v. Mississippi etc. R. R.*, 32 Miss. 359; *State Ins. Co. v. Redmond*, 1 McCrary, 308; *Wood v. Croea etc. R. R.*, 32 Ga. 273; compare *Mitchell v. Rome R. R.*, 17 Id. 574; and this view was maintained by an early case in New York: *Jenkins v. Union T. Road*, 1 Caines Cas. 86, which was approved in *Highland T. Co. v. McKean*, 11 Johns. 98, although it was there held that where the subscriber was a commissioner to receive subscriptions, and subscribed while the subscription book was in his hands, he would be considered as having made the required payment. See to the same effect *Ryder v. Alton etc. R. R.*, 13 Ill. 516; but the authority of *Jenkins v. Union T. Road*, *supra*, has been disapproved in *Lake Ontario etc. R. R. v. Mason*, 16 N. Y. 451; *Rensselaer etc. Plank Road Co. v. Barton*, Id. 457, note; compare *Excelsior Grain Binder Co. v. Stayner*, 25 Hun, 91; S. C., 58 How. Pr. 273;



61 Id. 456. Where this latter construction is adopted, and payment is regarded as a condition precedent, the payment need not necessarily be made at the outset, but it is sufficient if it be made at a subsequent time: *Black River etc. R. R. v. Clarke*, 25 N. Y. 208; *Ogdensburgh etc. R. R. v. Wolley*, 34 How. Pr. 54; *Excelsior Grain Binder Co. v. Stayner*, *supra*; *Fiscer v. Mississippi etc. R. R.*, *supra*; *Barrington v. Mississippi Central R. R.*, 32 Miss. 370; and the subsequent payment may be made in services: *Beach v. Smith*, 30 N. Y. 116. But it is held in Pennsylvania that where one subscribed after the organization of the company, his failure to make a payment at the time of subscribing did not invalidate his contract: *Erie etc. Plank Road Co. v. Brown*, 25 Pa. St. 156; *Philadelphia etc. R. R. v. Hickman*, 28 Id. 318; compare *Bucher v. Dillsburg etc. R. R.*, 76 Id. 306, 312; *Garrett v. Dillsburg etc. R. R.*, 78 Id. 465. The payment may be made for the subscriber by a third person, and ratified by the subscriber: *Mississippi etc. R. R. v. Harris*, 36 Miss. 17. As was stated above, payment may be made in services: *Beach v. Smith*, *supra*; and payment by a certified check is sufficient: *In re Staten Island etc. R. R.*, 37 Hun, 422; compare *Thorp v. Woodhull*, 1 Sandf. Ch. 411; or by a check drawn against a sufficient fund, and which would have been paid on presentation: *People v. Stockton etc. R. R.*, 45 Cal. 306; S. C., 13 Am. Rep. 178; or by a note: *Greenville etc. R. R. v. Woodsides*, 5 Rich. L. 145; S. C., 55 Am. Dec. 708; *Vermont Central R. R. v. Clages*, 21 Vt. 30, 35; *contra*: *Leightly v. Susquehanna etc. T. Co.*, 14 Serg. & R. 434. If the subscription or the by-laws, but not the charter, requires the payment, failure to pay will not vitiate the subscription: *Water Valley Mfg. Co. v. Seaman*, 53 Miss. 655; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491.

**SUBSCRIPTIONS UPON CONDITION.** — Unless forbidden by charter or statute, conditional subscriptions may be received by a corporation: Boone on Corporations, sec. 110; *New Albany etc. R. R. v. McCormick*, 10 Ind. 499; S. C., 71 Am. Dec. 337; *Keller v. Johnson*, 11 Ind. 337; S. C., 71 Am. Dec. 355; *Branham v. Record*, 42 Ind. 181, 199; *Henderson etc. R. R. v. Leavell*, 16 B. Mon. 358, 364; *Taggart v. Western Maryland R. R.*, 24 Md. 563, 595; *Jacks v. City of Helena*, 41 Ark. 213. In Pennsylvania, subscriptions made before a corporation is organized must be unconditional, but after incorporation they may be conditional: *Pittsburgh etc. R. R. v. Stewart*, 41 Pa. St. 54, 58; *Pittsburgh etc. R. R. v. Biggar*, 34 Id. 455; *Bedford R. R. v. Bowser*, 48 Id. 29; *Caley v. Philadelphia etc. R. R.*, 80 Id. 363; a conditional subscription before organization would be taken as absolute, and the condition simply be regarded as void. The early turnpike act of New York, it is also held, conferred no power on commissioners to receive conditional subscriptions, and such subscriptions were contrary to public policy, and void: *Butternuts etc. T. Co. v. North*, 1 Hill, 518; *Fort Edward etc. Plank Road Co. v. Payne*, 15 N. Y. 583.

If a subscription be made upon condition, it is not binding until the condition is complied with; and on the other hand, when the condition is performed, the subscriber is liable: Boone on Corporations, sec. 110; note to *Franklin Glass Company v. Alexander*, 9 Am. Dec. 101; *Santa Cruz R. R. v. Schwartz*, 53 Cal. 106; *Martin v. Pensacola etc. R. R.*, 8 Fla. 370; S. C., 73 Am. Dec. 713; *Evansville etc. R. R. v. Shearer*, 10 Ind. 244; *Jewett v. Lawrenceburgh etc. R. R.*, Id. 539; *Junction R. R. v. Reeve*, 15 Id. 236; *Indianapolis etc. R. R. v. Holmes*, 101 Id. 352; *Merrill v. Gamble*, 46 Iowa, 615; *Banet v. Alton etc. R. R.*, 13 Ill. 514; *Penobscot etc. R. R. v. Dunn*, 39 Me. 587; *Central T. Corp. v. Valentine*, 10 Pick. 142; *Swartwout v. Michigan etc. R. R.*, 24 Mich. 389; *Burrows v. Smith*, 10 N. Y. 550; *Dorris v. Sweeney*, 60 Id. 463; *Hamilton etc. Plank Road Co. v. Rice*, 7 Barb. 157; *Chamberlain v. Painesville etc. R. R.*,



15 Ohio St. 225; *Ashtabula etc. R. R. v. Smith*, Id. 328; *Philadelphia etc. R. R. v. Hickman*, 25 Pa. St. 318; *Spartanburg etc. R. R. v. De Graffenreid*, 12 Rich. L. 675; S. C., 78 Am. Dec. 476; *Lowe v. E. & K. R. R.*, 1 Head, 659. If a subscription be on condition that a railroad should "locate and construct" its road along a certain route, the condition is complied with by the location of the road: *Miller v. Pittsburgh etc. R. R.*, 40 Pa. St. 237; S. C., 80 Am. Dec. 570; *Swartwout v. Michigan etc. R. R.*, 24 Mich. 389; *McMillan v. Maysville etc. R. R.*, 15 B. Mon. 218; S. C., 61 Am. Dec. 181; and where a subscription is made to the stock of a railroad, on condition that the final location of the road should be upon a certain route, the permanent location of the road contemplated by the contract is the adoption by the directors of the route mentioned: *Smith v. Allison*, 23 Ind. 369, citing the principal case. Where a subscription is made on condition that a certain sum be subscribed by the citizens of a certain place, a subscriber is a citizen of that place, within the meaning of the condition, if he boards, does business, and spends nearly all his time there, although he was domiciled in another place: *Union Hotel Co. v. Hersee*, 79 N. Y. 454; S. C., 35 Am. Rep. 536.

A condition upon which a subscription depends may, of course, be waived. And it has been held that a promissory note, subsequently given for a conditional subscription, was a waiver of the condition, in *O'Donald v. Evansville etc. R. R.*, 14 Ind. 259; *Evansville etc. R. R. v. Dunn*, 17 Id. 603; compare the principal case. So in *Chamberlain v. Painesville etc. R. R.*, 15 Ohio St. 225, it was held that the giving by a subscriber of his note for the balance of his subscription, and taking therefor from the company a receipt stipulating that, when paid, the amount of the note should be applied on his stock, is *prima facie* a waiver of conditions precedent; and in *Slipher v. Earhart*, 83 Ind. 173, it was decided, distinguishing the principal case, that a subscriber for corporate stock, payable on certain conditions, by subsequently giving notes for the amount payable on the happening of the conditions, but omitting to mention one condition, thereby waived the omitted condition. A subscriber also waives a condition precedent by executing a deed of lands, absolute in form, in payment therefor, and receiving the stock of the corporation: *Parks v. Evansville etc. R. R.*, 23 Id. 567.

WITHDRAWAL OR RELEASE OF SUBSCRIBER.—A subscriber, properly speaking, to corporate stock has no power to rescind his contract at pleasure and withdraw from the corporation: 1 Morawetz on Private Corporations, sec. 109; *Sebna etc. R. R. v. Tipton*, 5 Ala. 787; S. C., 39 Am. Dec. 344; *United Society v. Eagle Bank*, 7 Conn. 456; *Bishop's Fund v. Eagle Bank*, Id. 476; *Klein v. Alton etc. R. R.*, 13 Ill. 514; *Ryder v. Alton etc. R. R.*, Id. 516; *Muskingum Valley T. Co. v. Ward*, 13 Ohio, 120; S. C., 42 Am. Dec. 191; *Johnson v. Wabash etc. Plank Road Co.*, 16 Ind. 389; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; compare *Payne v. Ballard*, 23 Miss. 88; S. C., 55 Am. Dec. 74; nor can the agents of the corporation consent, on its behalf, to the withdrawal of a subscriber: 1 Morawetz on Private Corporations, sec. 109; *Bedford R. R. v. Bowser*, 48 Pa. St. 29; *Hughes v. Antietam Mfg. Co.*, *supra*; *Jewett v. Valley R'y*, 34 Ohio St. 601; *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; *Gill v. Balis*, 72 Id. 424; *Upton v. Tribilcock*, 91 U. S. 45, 48; and the president of a corporation has no authority by virtue of his office to consent that an absolute and unconditional subscription shall be changed so as to become conditional, to the prejudice of the company or its creditors: *Morgan Co. v. Thomas*, 76 Ill. 120. In *Greer v. Chartier's R'y*, 96 Pa. St. 391, S. C., 42 Am. Rep. 548, it was held that where a person receives the subscription book of a corporation to procure subscriptions, and enters his name therein as a subscriber, and persuades others to

subscribe, keeping the book about six months, he cannot release himself from his contract by cutting out his name and returning the book. And where one, having possession of an agreement to take shares in the capital stock of a corporation, after subscribing in good faith for shares of such stock induces others to subscribe on the faith of his subscription, and subsequently, without the knowledge of the other subscribers, alters the paper by reducing the number of shares, and delivers the instrument in that condition to the secretary, who is also a director, this will not affect the liability of one thus induced to subscribe, although at the time of such delivery the person making the alteration explains the same to the secretary, who makes no objection: *Jewett v. Valley R'y*, 34 Ohio St. 601. In *Whittlesey v. Frantz*, 74 N. Y. 456, it was held that where the defendant's subscription was made after another subscriber, and the subscription paper showed the name of the latter canceled by lines across it, and opposite it appeared the words, "By agree't, Mar. 5, '73," the alteration did not *per se* discharge the defendant. In *Sodus Bay etc. R. R. v. Hamlin*, 24 Hun, 390, a subscriber was held not released, where his signature was cut from a printed paper of subscription, and pasted on a facsimile.

If, also, a secret arrangement or agreement, oral or written, be made between the officers of the company and a subscriber, at or before the time of the subscription, that the subscriber shall be allowed the privilege of withdrawing, or that his liability shall in some way be limited, such an arrangement or agreement will not be sustained, and will constitute no defense to the liability of the subscriber, as it appears by the terms of his subscription, or to the liability of any other subscriber: *Anderson v. Newcastle etc. R. R.*, 12 Ind. 376; S. C., 74 Am. Dec. 218; *New Albany etc. R. R. v. Fields*, 10 Ind. 187; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; S. C., 22 Am. Rep. 199; *Jewell v. Rock River Paper Co.*, 101 Ill. 57; *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; *Robinson v. Pittsburgh etc. R. R.*, 32 Pa. St. 334; S. C., 72 Am. Dec. 792; *Swartwout v. Michigan etc. R. R.*, 24 Mich. 389; *Walker v. Mobile etc. R. R.*, 34 Miss. 245; *White Mountains R. R. v. Eastman*, 34 N. H. 124; *Connecticut etc. R. R. v. Bailey*, 24 Vt. 465; S. C., 58 Am. Dec. 181; *Upton v. Tribilcock*, 91 U. S. 45. Such arrangements are a fraud upon the other subscribers; and if they are oral, the additional objection exists that to allow them to be proved would be to vary the terms of written contracts by parol evidence.

A subscription to corporate stock will not be invalidated by the irresponsibility of other subscribers for shares necessary to be subscribed before the organization of the corporation, if such other subscriptions were made and accepted by the company in good faith, the subscribers being apparently responsible: *Penobscot etc. R. R. v. White*, 41 Me. 512; S. C., 66 Am. Dec. 257; nor is it any defense to an action upon a subscription that stock had been awarded by the commissioners to persons whose names were not on the stock-book: *Swartwout v. Michigan etc. R. R.*, 24 Mich. 389.

A subscriber will not be released because the managing agents of the corporation have violated its charter: 1 Morawetz on Private Corporations, sec. 115, 116; *Hannibal etc. Plank Road Co. v. Menefee*, 25 Mo. 547; *Mississippi etc. R. R. v. Cross*, 20 Ark. 443; *Smith v. Tallassee etc. Plank Road Co.*, 30 Ala. 650; *Merrill v. Gamble*, 46 Iowa, 615; *Merrill v. Beaver*, Id. 646; *Merrill v. Reaver*, 50 Id. 404; *Taggart v. Western Maryland R. R.*, 24 Md. 563, 596; *Southern Life Ins. & T. Co. v. Lanier*, 5 Fla. 110; S. C., 58 Am. Dec. 448; nor is it a defense to an action on his subscription that the affairs of the corporation have been unwisely managed: 1 Morawetz on Private Corporations, sec. 117; *Hornaday v. Indiana etc. R'y*, 9 Ind. 263; *Illinois Grand Trunk R. R. v. Cook*,

29 Ill. 237; *Chellain v. Republic Life Ins. Co.*, 86 Id. 220; *Merrill v. Reaver*, 50 Iowa, 404. And the misapplication of a check taken upon a subscription, by paying it away upon the private debt of one of the directors, will not vitiate it, if otherwise valid: *Crocker v. Crane*, 21 Wend. 211; S. C., 34 Am. Dec. 228. A stockholder, when sued for a call upon his subscription, will not be allowed to dispute the necessity of the call: *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; so the purpose to which installments on subscriptions are to be applied constitutes no condition to their payment: *New Albany etc. R. R. v. Fields*, 10 Ind. 187.

Illegality in the election of directors cannot be set up as a defense to an action upon a subscription: *Johnson v. Crawfordsville etc. R. R.*, 11 Ind. 280; *Eakright v. Logansport etc. R. R.*, 13 Id. 404.

The effect upon subscriptions of a subsequent change of the charter of a corporation is considered in the note to *Commonwealth v. Cullen*, 53 Am. Dec. 461; and see also note to *Franklin Glass Co. v. Alexander*, 9 Id. 100; *Connecticut etc. R. R. v. Bailey*, 58 Id. 181; *Pacific R. R. v. Hughes*, 64 Id. 265; *Martin v. Pensacola etc. R. R.*, 73 Id. 713, and needs no further treatment here.

**SUBSCRIPTIONS OBTAINED BY FRAUD.** — The general rule that contracts obtained by fraud may be avoided by the injured party, applies to subscriptions to corporate stock: Boone on Corporations; 1 Morawetz on Private Corporations, sec. 94; note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 101; *Grangers' Ins. Co. v. Turner*, 61 Ga. 561; *Hamilton v. Grangers' etc. Ins. Co.*, 67 Id. 145; *West v. Crawfordsville etc. T. Co.*, 19 Ind. 242; *Melendy v. Keen*, 89 Ill. 395; *Water Valley Mfg. Co. v. Seaman*, 53 Miss. 655; *Selma etc. R. R. v. Anderson*, 51 Id. 829; *Occidental Ins. Co. v. Ganzhorn*, 2 Mo. App. 205; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188, 191; *Cunningham v. Edgefield etc. R. R.*, 2 Head, 23; compare *Goodrich v. Reynolds*, 31 Ill. 490; *Schaeffer v. Missouri Home Ins. Co.*, 46 N. Y. 248, 250; and the remedy may be either affirmative or defensive; but a subscriber cannot recover back the amount paid by him, if there are claims of creditors of the corporation to be satisfied: *Turner v. Grangers' etc. Ins. Co.*, 65 Ga. 649; S. C., 38 Am. Rep. 801; and see *Hamilton v. Grangers' etc. Ins. Co.*, *supra*. The subscription, however, is simply voidable, and is valid until disaffirmed: *Upton v. Englehart*, 3 Dill. 496.

Fraudulent representations of an agent or officer of the company, whereby one is induced to subscribe, must have been made within the scope of his authority to be binding on the corporation: *Buffalo etc. R. R. v. Dudley*, 14 N. Y. 336; *Oustar v. Titusville Gas etc. Co.*, 63 Pa. St. 381; *First Nat. Bank v. Hurford*, 29 Iowa, 579; *Rutz v. Esler etc. Mfg. Co.*, 3 Ill. App. 83; *Rives v. Montgomery etc. Plank Road Co.*, 30 Ala. 92.

All the elements of a fraudulent representation must exist in order to avoid a subscription, as well as any other contract. Thus the representation must be the affirmation of some fact, and not the expression of an opinion, or the statement of matter of law: *Clem v. Newcastle etc. R. R.*, 9 Ind. 488; S. C., 68 Am. Dec. 653; *New Albany etc. R. R. v. Fields*, 10 Ind. 187; *Eakright v. Logansport etc. R. R.*, 13 Id. 404; *Hardy v. Merrinweather*, 14 Id. 203, 205; *Bish v. Bradford*, 17 Id. 490; *Brownlee v. Ohio etc. R. R.*, 18 Id. 68, 72; *Wight v. Shelby R. R.*, 16 B. Mon. 4; S. C., 63 Am. Dec. 522; *Vicksburg etc. R. R. v. McKean*, 12 La. Ann. 638; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316, 329; *Walker v. Mobile etc. R. R.*, 34 Miss. 245; *Selma etc. R. R. v. Anderson*, 51 Id. 829; *Oregon Central R. R. v. Scoggin*, 3 Or. 161; *Upton v. Tribilcock*, 91 U. S. 45. It must, of course, be false in fact: *Selma etc. R. R. v. Anderson*, *supra*; it must have been with a fraudulent intent: *Id.*; *Salem Milldam Corp. v. Ropes*, 9 Pick. 187; S. C., 19 Am. Dec. 363; and it must have been

relied upon by the subscriber, under such circumstances that he had a right to rely on it: *Smith v. Tallahassee etc. Plank Road Co.*, 30 Ala. 650; *Selma etc. R. R. v. Anderson*, *supra*; *Oregon Central R. R. v. Scoggin*, *supra*; *Andrews v. Ohio etc. R. R.*, 14 Ind. 169.

The right to avoid a subscription induced by fraud may, it should be noticed, be barred by laches: *Upton v. Tribilcock*, 91 U. S. 45; *City Bank v. Bartlett*, 71 Ga. 797.

**STATUTE OF LIMITATIONS TO ACTIONS ON SUBSCRIPTIONS.** — A right of action to recover installments of a subscription to corporate stock does not accrue, it is held, until a call is made, and the statute of limitations does not begin to run until that time: *Gibson v. Columbia etc. T. Co.*, 18 Ohio St. 396. So it is held that stockholders in a bank cannot oppose the statute of limitations to the claim of creditors to have the stock paid up, it being a continuing trust and confidence to which the statute had no application: *Payne v. Bulard*, 23 Miss. 88; S. C., 55 Am. Dec. 74. But in Pennsylvania the rule is, that although the statute does not begin to run against a subscription until a call has been made, yet the call must be made within six years, or the delay satisfactorily accounted for, or else a recovery on the subscription is barred: *Pittsburgh etc. R. R. v. Byers*, 32 Pa. St. 22; S. C., 72 Am. Dec. 770; *McCully v. Pittsburgh etc. R. R.*, 32 Pa. St. 25; *Pittsburgh etc. R. R. v. Graham*, 36 Id. 77; S. C., 2 Grant Cas. 259.

**ESTOPPEL TO DENY CORPORATE EXISTENCE.** — A subscriber to corporate stock is estopped by his subscription from denying the existence of the corporation in an action against him on his subscription, or on a note or bond given for the same: *Wood v. Coosa etc. R. R.*, 32 Ga. 273; *Goodrich v. Reynolds*, 31 Ill. 490, 497; *Anderson v. Newcastle etc. R. R.*, 12 Ind. 376; S. C., 74 Am. Dec. 218; *Brownlee v. Ohio etc. R. R.*, 18 Ind. 68; *Wight v. Shelby R. R.*, 16 B. Mon. 4; S. C., 63 Am. Dec. 522; *Chester Glass Co. v. Dewey*, 16 Mass. 94; S. C., 8 Am. Dec. 128; *Busey v. Hooper*, 35 Md. 15; S. C., 6 Am. Rep. 350; *Swartwout v. Michigan etc. R. R.*, 24 Mich. 389; *Parker v. Northern Central etc. R. R.*, 33 Id. 23; *Yard v. Pacific Mut. Ins. Co.*, 10 N. J. Eq. 480; S. C., 64 Am. Dec. 467; *Dutchess Cotton Man. v. Davis*, 14 Johns. 238; S. C., 7 Am. Dec. 459; *Black River etc. R. R. v. Clarke*, 25 N. Y. 208; *Sodus Bay etc. R. R. v. Hamlin*, 24 Hun, 390; *Chubb v. Upton*, 95 U. S. 665, 667; *a fortiori* if he takes an active interest in the affairs of the corporation: *Danbury etc. R. R. v. Wilson*, 22 Conn. 435; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Rutz v. Elser etc. Mfg. Co.*, 3 Ill. App. 83; and see *New Hampshire Central R. R. v. Johnson*, 30 N. H. 390; S. C., 64 Am. Dec. 300; but it is held that until the statutory requirements to organize a corporation have been complied with, a subscriber to the articles of association is not estopped to deny the existence of the corporation: *Indianapolis Furnace etc. Co. v. Herkimer*, 46 Ind. 142; *Nelson v. Blakey*, 47 Id. 38, 40; *Reed v. Richmond etc. R. R.*, 50 Id. 842; *Rikhoff v. Brown's etc. Machine Co.*, 68 Id. 388. And if an organization is completed where there is no law, or an unconstitutional law authorizing an organization as a corporation, the doctrine of estoppel does not apply: *Henson v. Cincinnati etc. R. R.*, 16 Id. 275; S. C., 79 Am. Dec. 430.

## STATE EX REL. LEAL v. JONES.

[19 INDIANA, 256.]

**ELECTION IS NOT VOID BY REASON OF OMISSION TO GIVE NOTICE THAT IT WAS TO TAKE PLACE.**

**OFFICE MAY BECOME VACANT BY OFFICER'S ABANDONMENT AND REMOVAL from the state, and this, without a judicial declaration of the vacancy.**

**VACANT OFFICE MAY BE FILLED BY ELECTION AND APPOINTMENT BEFORE JUDICIAL DECLARATION OF VACANCY is procured, where it appears *prima facie* that acts or events have occurred subjecting the office to such a declaration of vacancy; but if the person so selected or appointed, in attempting to take possession of the office, be resisted by the previous incumbent, he will be compelled to try the right in some mode prescribed by the law.**

**PERSON ELECTED OR APPOINTED TO OFFICE BEFORE IT IS JUDICIALLY DECLARED VACANT MAY TAKE POSSESSION, if he finds the office in fact vacant, and can take possession uncontested by the former incumbent; and as long as he remains in possession, he will be an officer *de facto*; and should the former incumbent never appear to contest his right, he will be regarded as having been an officer *de facto* and *de jure*; but if the former incumbent appear, the burden is upon him of proceeding to oust the then actual incumbent; and if in such proceeding it is made to appear that facts had occurred before the appointment or election justifying a judicial declaration of a vacancy, it will then be declared to have existed, and the election or appointment will be held to have been valid.**

**MANDAMUS.** The facts are stated in the opinion.

*D. S. Major*, for the appellant.

*McDonald and Roache*, for the appellee.

By Court, PERKINS, J. In July, 1861, Elias T. Crosby was auditor of Dearborn County, Indiana. On the seventeenth day of that month he abandoned the office and removed from the state.

At the annual election, in October following, William Leal became a candidate for the office of auditor of Dearborn County, and received 1,128 votes, being the highest number cast for a candidate for that office; but the clerk of the circuit court of the county, Samuel L. Jones, refused, within twenty days, and still refuses, to certify the vote for the candidates for the office of auditor, at said election, though there was no contest, to the secretary of state, whereby the relator was prevented from obtaining a commission for the office to which he claims to have been elected. This suit was instituted to obtain a mandate compelling the clerk to make and transmit the certificate.

A demurrer to the complaint was sustained, and the mandate refused, on the two grounds that no notice of the election

for an auditor of the county was given, and that there was no vacancy capable of being filled at the election.

It was the duty of the clerk to certify the votes to the secretary of state: 1 Gavin & Hord, p. 312, sec. 38; and this, without regard to the legality of the election. The duties of the clerk are ministerial, not judicial: *Brower v. O'Brien*, 2 Ind. 423; 1 Gavin & Hord, 306, note. Still, where it is manifest that the election held was void, a court will not compel a ministerial officer to perform a useless act: *Beal v. Ray*, 17 Ind. 554; S. C., 18 Id. 346. Is it so manifest in this case?

The election for auditor was not void by the omission to give notice that it was to take place: *People v. Cowles*, 13 N. Y. 850.

The election may have been valid, if the office had been vacant twenty days or upward, at the day of the election. We say it may have been, not that it necessarily was; circumstances may control the validity of any election.

Does the complaint, in this case, then, show *prima facie* that a vacancy existed in the office of county auditor of Dearborn County twenty days before the annual October election for 1861? A vacancy may so occur in an office as to require it to be filled at a succeeding annual election, by the acceptance by the incumbent of another incompatible office: Ind. Dig. 599; by the expiration of the current term of the incumbent: *Biddle v. Willard*, 10 Ind. 62; by the death of the incumbent: *People v. Cowles*, *supra*; see *State v. Pidgeon*, 8 Blackf. 132; by the removal of the incumbent from the office by legal proceedings; by the voluntary removal of the incumbent, living, from the township, county, or state, as the case may be; and this without a judicial declaration of the vacancy. This is expressly ruled in *Hedley v. Board of Commissioners*, 4 Id. 116, as we understand that case. The constitution and statutes of the state require county officers to be residents, and to attend to their duties at the county seat.

We think the demurrer should have been overruled, and the defendant required to answer. An additional observation or two may be justified.

We think the following propositions are deducible from the judicial decisions of the supreme court of Indiana:—

1. Where it appears, *prima facie*, that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a



judicial declaration of the vacancy, and appoint or elect, according to the forms of law, a person to fill such office; but if, when such person attempts to take possession of the office, he is resisted by the previous incumbent, he will be compelled to try the right, and oust such incumbent, or fail to oust him, in some mode prescribed by law; 2. If such elected or appointed person finds the office, in fact, vacant, and can take possession, uncontested by the former incumbent, he may do so, and so long as he remains in such possession, he will be an officer *de facto*; and should the former incumbent never appear to contest his right, he will be regarded as having been an officer *de facto* and *de jure*; but should such former incumbent appear, after possession has been taken against him, the burden of proceeding to oust the then actual incumbent will fall upon him; and if in such proceeding it is made to appear that facts had occurred before the appointment or election justifying a judicial declaration of a vacancy, it will be then declared to have existed, and the election or appointment will be held to have been valid: See *State v. Trustees of Vincennes University*, 5 Ind. 91, in addition to authorities cited.

The judgment is reversed, with costs. Cause remanded for further proceedings.

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NOTICE OF ELECTION, WHETHER NECESSARY: See *People ex rel. McKane v. Weller*, 70 Am. Dec. 754. The principal case is cited in *City of Lafayette v. State*, 69 Ind. 228, to the point that if an election is otherwise regular, the want of any notice thereof, previously given, will not invalidate it.

OFFICE WILL BECOME VACANT, under the laws of Indiana, if the incumbent accepts another incompatible office: *Kerr v. Jones*, 19 Ind. 350; or by removal from the county or state: *Yonkey v. State*, 27 Id. 241; *Krant v. State*, 47 Id. 525. The principal case is an authority for the foregoing.

THE PRINCIPAL CASE IS REFERRED TO in *State ex rel. Cornell v. Allen*, 21 Ind. 521, on the point that an election to an office is valid, if a vacancy exists, proper to be filled by election, at the date of election; in *Leech v. State*, 78 Id. 573, on the point whether, when an office is filled by an officer *de facto* having color of right and the insignia of title, the office can be said to have been vacant, so as to authorize the election of another in the absence of any proper proceeding to have the supposed vacancy adjudged; and in *Mowbray v. State*, 88 Id. 329, on the point that where a city council declares the office of treasurer vacant, and appoints one to fill the vacancy, the treasurer acquiescing, the appointee becomes treasurer *de facto*. It is cited in *Leach v. Cassidy*, 23 Id. 450, to the point that when it is made apparent to the court that a person is in possession of the office of school trustee, it can properly compel the auditor to recognize him as trustee, by drawing a warrant in his favor for school funds, but having done that, its duty in that case ended; in *Commissioners of Boone Co. v. State*, 61 Id. 387, to the point that a commission to an officer, issued by the governor, is at most merely *prima facie* evidence



of the facts recited in it, and is not conclusive; in *Gregory v. State*, 94 Id. 389, to the point that the clerk of the circuit court cannot be vested with judicial functions; and in *Baker v. Wambaugh*, 99 Id. 316, the summary made by Perkins, J., is quoted with approval.

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## JONES v. DORR.

[19 INDIANA, 384.]

**MAKER OF NOTE IS NOT ESTOPPED BY HIS REPRESENTATIONS** made to the holder, after he has become the owner thereof, to the effect that the note is all right, and would be paid; nor is the maker bound by such representations, when repeated by the holder to one to whom he sold the note.

**ACTION to foreclose a mortgage.** The facts are stated in the opinion.

*Bradley and Woodward*, for the appellants.

*M. K. Farrand*, for the appellee.

By Court, DAVISON, J. The appellee, who was the plaintiff, brought an action against Balinda Jones to foreclose a mortgage on the west half of the northwest quarter of section 16, in township 35 north, of range 6 east, in Porter County. The mortgage bears date April 15, 1856, and was executed by the defendant to one Thomas Englin, to secure the payment of a note for two hundred dollars. It is averred in the complaint that Englin, by indorsement, assigned the note and mortgage to one Absalom Leonard, who indorsed them to the plaintiff. The defendant answered: 1. By a denial; 2. That the note, the payment of which is secured by the mortgage, was given for a part of the purchase-money of the above-described real estate, which at the time it was given was sold, and by deed in fee conveyed by Englin to the defendant; and that Englin, the grantor, in and by said deed, covenanted that he was lawfully seised of the premises; that he had good right to convey; that they were unencumbered; and that he would warrant and defend the title to the same against all claims, etc. Of these covenants six breaches were alleged. The third and fourth were withdrawn before the cause was submitted for trial. The first, second, fifth, and sixth are as follows: 1. That the grantor was not lawfully seised, etc., and had not good right to sell and convey, etc.; 2. That he had no title to the land; 5. That the same, at the time of the conveyance, was owned by the

Fort Wayne and Chicago Railroad Company, and that company still owns it; 6. That when the conveyance was made, the land was encumbered by a deed for the right of way over and across the same, executed to the Fort Wayne and Chicago Railroad Company for the use of said company, and that after the defendant received said conveyance, the company entered upon and took possession of a part of the land, to wit, four acres, worth \$150, and constructed thereon her railroad, and in the construction thereof has made large embankments and excavations of earth, to the damage of the land and of the defendant two hundred dollars, etc.

The plaintiff's reply to the answer consists of a general denial, and four special paragraphs. The defendant demurred to the second, third, fourth, and fifth paragraphs. To the second the demurrer was overruled, but sustained as to the others. The issues were submitted to the court, who found for the plaintiff, and having refused a new trial, rendered judgment, etc.

The second reply, to which the demurrer was overruled, is as follows: "And the plaintiff says that before he purchased the note from Absalom Leonard, as stated in the complaint, the defendant represented to Leonard that said note was all right and just, and that she would pay it as soon as she could, and claimed no set-off or other defense to the same; that Leonard, when he sold the note to the plaintiff, informed him of the representations of the defendant respecting the note, and the plaintiff, believing said representations to be true, and relying upon them, purchased it of Leonard; wherefore," etc.

Was this reply sufficient to avoid the answer? If the representations and promises set up in the reply had been made to Leonard, when he was negotiating for the purchase of the note, and he had acted upon them, the defendant would have been estopped from setting up any defense to its validity, because, in that case, her admissions and representations would have constituted a valid estoppel. And the same would be true had they been made by her to the plaintiff, at the time he purchased. But these representations were made after Leonard had bought the note. He was not, in respect to his purchase, in any degree influenced by them, and the result is, they constituted no estoppel in his favor. If, then, the declarations were not an estoppel in Leonard's favor, no statement of his could make them an estoppel when pleaded by his assignee. The reason for this conclusion is obvious. The statements of

Leonard are his own statements, not the statements of the defendant, and the plaintiff was not, therefore, authorized to rely upon them. The demurrer should have been sustained.

The judgment is reversed, with costs. Cause remanded.

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**MAKER OF NOTE IS NOT ESTOPPED BY HIS REPRESENTATIONS** made to the holder after he has become the owner: *Windle v. Canaday*, 21 Ind. 248; *Statesman v. Thomas*, 39 Id. 390; *Reagan v. Hadley*, 57 Id. 523; *Crossen v. May*, 68 Id. 244, all citing the principal case.

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## JOHNS v. STATE.

[19 INDIANA, 421.]

**ACCESSARY BEFORE FACT, IN ONE STATE, TO CRIME COMMITTED IN ANOTHER, CANNOT BE PUNISHED THEREFOR** in the state where the crime was committed; although the laws of the latter state provide that "every person, being without this state, committing or consummating an offense by an agent, or means within the state, is liable to be punished by the laws thereof, in the same manner as if he were present, and had commenced and consummated the offense within the state."

**INDICTMENT** for larceny. The opinion states the facts.

*D. Kilgore*, for the appellant.

*Oscar B. Hord*, attorney-general, *Walter March*, *John F. Kibbey*, and *W. A. Peelle*, for the state.

By Court, **WORDEN, J.** On the night of the 4th of February, 1862, the office of the treasurer of Jay County was broken open, and a large amount of money stolen therefrom. Johns, the appellant, together with three others, was indicted for the larceny. Upon trial, the appellant was convicted and sentenced to imprisonment in the penitentiary.

At the proper time, the appellant asked the following charge, which was applicable to the evidence, and was refused, viz.: "If the defendant did nothing more than, at a time previous to the commission of the crime charged in the indictment, to counsel with and encourage Barker and Blackburn, in the state of Ohio, to come to Indiana, and commit the larceny charged in the indictment, and was not himself in Indiana at the time the offense was committed, or nearer the place than the city of Dayton, state of Ohio, he should be acquitted on this indictment."

In determining whether the conviction can be sustained,

two questions arise: 1. Whether an accessory before the fact can be convicted on the indictment for the larceny, to which he was thus accessory; and 2. Whether he can be convicted where the acts done by him, making him such accessory, were committed without the limits of the state. If either of these questions shall be determined against the state, the judgment must be reversed.

From the view which we take of the second question, it will be unnecessary to pass upon the first, but a few observations may be made upon it, having some bearing, incidentally, upon the second. At common law, an accessory before the fact must have been charged as such, and not as principal; and he could not be convicted, except jointly with or after the principal, whose acquittal acquitted him: 1 Bishop's Crim. Law, secs. 467, 468. But our statutes have, for many purposes, abrogated all distinction between principal and accessory. Thus the forty-ninth section of the act concerning crime and punishment (2 R. S. 1852, p. 422) subjects persons aiding or abetting, etc., in the commission of crime (felonies), to the same punishment prescribed for principals; and the fifty-first section enacts that they may be indicted and convicted before or after the principal offender is indicted and convicted.

The sixty-sixth section of the act regulating practice in criminal cases, provides that, "any person who counsels, aids, or abets in the commission of any offense may be charged, tried, and convicted in the same manner as if he were a principal." The terms of this section are clear and explicit, and if valid, would seem to authorize the conviction of an accessory before the fact on an indictment charging him with the principal offense.

But in the Bill of Rights (Const., art. 1, sec. 13) it is declared that, "in all criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him, and to have a copy thereof." Whether, where the state seeks a conviction on the ground that the accused is an accessory before the fact, an indictment which charges him as principal, sufficiently apprises him of the "nature and cause of the accusation," is a question which we leave open, it being unnecessary to determine it. Where it shall become necessary to determine it, the court will undoubtedly have the benefit of a full discussion of the question, by counsel, on both sides.

We pass to the second question: Can a person who, out of

the state, becomes an accessory before the fact, to a felony committed within the state, be punished by our laws?

The state relies upon the following provision of our statute, viz.: "Every person, being without this state, committing or consummating an offense by an agent, or means within the state, is liable to be punished by the laws thereof, in the same manner as if he were present and had commenced and consummated the offense within the state": 2 R. S. 1852, p. 361, sec. 2.

Before undertaking to give this provision an interpretation, we will advert to some general principles that will aid us in doing so. It may be assumed, as a general proposition, that the criminal laws of a state do not bind, and cannot affect, those out of the territorial limits of the state.

Each state, in respect to each of the others, is an independent sovereignty, possessing ample powers, and the exclusive right to determine within its own borders what shall be tolerated and what prohibited; what shall be deemed innocent and what criminal; its powers being limited only by the Federal Constitution, and the nature and objects of government. While each state is thus sovereign within its own limits, it cannot impose its laws upon those outside of the limits of its sovereign power. Our own constitution has expressly fixed the boundaries of its sovereignty. It provides, after having defined the geographical boundaries of the state, that "the state of Indiana shall possess jurisdiction and sovereignty co-extensive with the boundaries declared in the preceding section; and shall have concurrent jurisdiction in civil and criminal cases with the state of Kentucky on the Ohio River, and the state of Illinois on the Wabash, so far as said rivers form the common boundary between this state and the said states respectively": Const., art. 14, sec. 2.

But while it is clear that the criminal law of a state can have no extraterritorial operation, it is equally clear that each state may protect her own citizens in the enjoyment of life, liberty, and property, by determining what acts, within her own limits, shall be deemed criminal, and by punishing the commission of those acts. And the right of punishment extends not only to persons who commit infractions of the criminal law actually within the state, but also to all persons who commit such infractions as are, in contemplation of law, within the state.

Decided cases will illustrate the last proposition. The case

of *People v. Adams*, 3 Denio, 190 [45 Am. Dec. 468], was one in which this subject underwent a full discussion and examination. It was there held that a person who, in the state of Ohio, made certain false representations, by means of which he obtained, through innocent agents, goods in the city of New York, was guilty of a violation of the laws of the latter state, and could be there punished. The case goes upon the ground that, as the agents through whom the goods were obtained were innocent, the party thus making the representations, and through such agents obtaining the goods, must be regarded as the principal in the crime, and therefore, that personal presence in New York was not necessary. The court say: "Personal presence at the place where a crime is perpetrated is not indispensable to make one a principal offender in its commission. Thus where a gun is fired from the land which kills a man at sea, the offense must be tried by the admiralty, and not by the common-law courts; for the crime is committed where the death occurs, and not at the place whence the cause of death proceeds. And on the same principle, an offense committed by firing a shot from one county, which takes effect in another, must be tried in the latter, for there the crime was committed; 1 Chitty's Crim. Law, 155, 191; *United States v. Davis*, 2 Sum. 485. In such cases, the offender is the immediate actor in the perpetration of the crime, although not personally present at the place where the law adjudges it to be committed. He is there, however, by the instrument used to effect his purpose, and which the law holds sufficient to make him responsible at that place for the act done there.

"But crimes may be perpetrated through the instrumentality of living agents, in the absence of the principal, and our law books are full of such cases. Where poison is knowingly sent, to be administered as medicine by attendants who are ignorant that it is poison, and death ensues, the person who thus procures the poison to be taken is guilty of murder. So where a child without discretion, an idiot, or a madman, is induced by a third person to do a felonious act, the instigator alone is guilty, and although not personally present at the perpetration of the crime, he is a principal felon. . . . But where the agent is a guilty actor in the commission of the felony, the law makes him the principal offender, and the one by whom he was employed, or instigated, is, if absent, but an accessory before the fact." The case of *King v. Brisac*, 4 East, 164, cited in *People v. Adams*, 3 Denio, 190 [45 Am. Dec. 468],

is also in point. It was an information for a conspiracy to cheat the crown by false vouchers. The trial was in the county of Middlesex, and it appeared that all the acts in which either of the defendants immediately took part were done by them either on the high seas, at Brassa Sound, or at Leswick, in the isle of Shetland. The only acts proved to be done in Middlesex were those which were done by them mediately, through the intervention of innocent persons. Upon this it was objected that all the acts of the defendants themselves, which constituted the offense of conspiracy, were committed out of the jurisdiction of the common law. But it was held that the acts done by the innocent agents of the defendants, in Middlesex, were their acts done in that county. The case of *Commonwealth v. Harvey*, 8 Am. Jur. 69, is also in point. There, Harvey, in the state of New York, had perpetrated a forgery, by means of which he procured, through innocent persons, a sum of money from a house in Boston, he remaining all the time in the state of New York. It was held, on the principle already adverted to, that he was amenable to the criminal law of Massachusetts, the crime, in contemplation of law, having been committed there.

There are other cases running through the books that serve to illustrate and establish our proposition that a state may rightfully punish all persons who commit an offense within the state, either actually or in contemplation of law; but it is unnecessary to extend this opinion by any further examination of them. Two circumstances may be noticed in reference to all the cases that have come under our observation: 1. The crime has been deemed in law to have been committed in the state where it was punished, although the perpetrator, at the time of its commission, may have been personally out of the state; and 2. The party punished has been held to be the person who committed it; that is, he has been held to be the principal, and not merely an accessory before the fact. Indeed, in no justly legal sense can it be said that a man who, in one state, procures a responsible party to go out of that state into another and there commit a crime, commits any crime within the latter state.

No case has come under our notice, and we presume there is none, where a party has been punished in a state where a crime has been committed, who was merely an accessory before the fact, to such crime in another state. On the contrary, the only direct adjudication that we are aware of, on the point, is



the other way. The case alluded to is that of *Ex parte Joseph Smith* (the Mormon prophet), 3 McLean, 121. Smith had been charged, in Missouri, with being an accessory before the fact, to an assault and battery, with intent to kill. The assault, etc., was perpetrated in Missouri, but Smith's acts, making him such accessory, were committed in the state of Illinois. Upon a requisition of the governor of Missouri upon the governor of Illinois, Smith was arrested, and took out a writ of *habeas corpus* for his discharge, and was brought before the circuit court of the United States. That court express their views upon the point in question as follows: "It is the duty of the state of Illinois to make it criminal in one of its citizens to aid, abet, counsel, or advise, any person to commit a crime in her sister state. Any one violating the law would be amenable to the laws of Illinois, executed by its own tribunals. Those of Missouri could have no agency in his conviction and punishment. But if he shall go into Missouri, he owes obedience to her laws, and is liable before her courts, to be tried and punished for any crime he may commit there; and a plea that he was a citizen of another state would not avail him. If he escape, he may be surrendered to Missouri for trial. But when the offense is perpetrated in Illinois, the only right of Missouri is to insist that Illinois compel her citizens to forbear to annoy her. This she has a right to expect. For the neglect of it, nations go to war and violate territory." Smith was discharged from the arrest.

With the light of these considerations before us, we return to the statutory provision before quoted, to ascertain its meaning. "Every person being without this state, committing or consummating an offense by an agent, or means within the state, is liable," etc. This language, in our opinion, embraces all persons who may, without the state, commit a crime, which, in legal contemplation, is to be deemed as having been committed within the state, under circumstances that will make the person thus committing it a principal in the crime. Such, for instance, as shooting from without the state, thereby killing a person within the same; sending an "infernal machine," through innocent agents, from without the state, whereby life is destroyed; and cases of a like character with these, and those mentioned in a former part of this opinion. Also, when a person, though out of the state, is present, aiding and abetting, so as to make himself a principal in the second degree, as may well be, a state line simply being between such

person and the principal in the first degree, who in person perpetrates the offense. This construction seems to be in harmony with principle, and also with the authorities.

But the provision cannot be construed to embrace persons who, out of the state, become mere accessaries before the fact to a crime committed within the state. This conclusion is arrived at from the considerations already mentioned, and from the fact that the language does not admit of such interpretation. Penal statutes, says Bishop, "are to reach no further in meaning than their words; no person is to be made subject to them by implication; and all doubts concerning their interpretation are to preponderate in favor of the accused": 1 Bishop's Crim. Law, sec. 115.

What do the words "every person committing or consummating" mean? Undoubtedly, every person who commits or consummates an offense as provided for. This embraces those only who commit or consummate the offense, and not those who, being absent, have merely counseled, etc., the commission or consummation thereof. But it is said that he who, out of the state, counsels, aids, etc., another to commit a crime within the state, commits the crime himself, by an agent. If a party, being absent, procures an innocent agent to commit a crime, he himself, as we have seen, becomes the principal; which was clearly not the case here. If, on the other hand, a party, being absent, procures a guilty agent to commit the crime, the agent thus committing it is the principal, and the party thus procuring it is an accessary before the fact, and can in no legal sense be said to have committed it.

It may be said that a man who procures another to commit a crime is as guilty, morally, as he who actually commits it. This all may be, but it does not prove that the courts of another state than that in which the offense was committed have a right to punish it. We have a statute providing for the punishment of persons who have become accessaries before the fact to felonies committed in other states: Stat. 1853, p. 72. It is not unfair to presume that Ohio has a similar one. But whether she has or not, the defendant cannot be punished under our laws.

It is urged that, inasmuch as by our law the distinction between principal and accessary is, in many respects, taken away, there should be no distinction made in the construction of the section under consideration. But it is laid down that a statute will not be taken, by implication, to abrogate the distinction

between principal and accessory, or any other distinction already known to the law: 1 Bishop's Crim. Law, sec. 86; *State v. Ricker*, 29 Me. 84.

For these reasons, the judgment must be reversed.

The judgment is reversed, and the cause remanded. The clerk will give the proper notice for a return of the prisoner.

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ACCESSARY BEFORE FACT IN ONE STATE TO CRIME COMMITTED IN ANOTHER CANNOT BE PUNISHED THEREFOR in the state where the crime was committed; *State v. Moore*, 59 Am. Dec. 354; *State v. Chapin*, 65 Id. 452; and see *People v. Adams*, 45 Id. 468.

THE PRINCIPAL CASE IS CITED in *Stewart v. Jessup*, 51 Ind. 415, to the point that a person cannot be convicted and punished in one state for a crime committed in another; and referred to in *McCarty v. State*, 44 Id. 215, on the question of punishment of an accessory; and also in *Eaton etc. R. R. v. Hunt*, 20 Id. 466, as to punishment of crimes.

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## SNYDER v. STUDEBAKER.

[19 INDIANA, 462.]

ESTOPPEL ARISES UPON MATTER OF FACT, and not upon matter of law.

CONTRACT WITH CORPORATION DOES NOT ESTOP PARTY MAKING IT TO DISPUTE EXISTENCE OF CORPORATION, if there be no law which authorized the supposed corporation, or if the statute authorizing it be unconstitutional and void.

CONTRACT WITH CORPORATION WILL ESTOP PARTY MAKING IT TO DISPUTE ORGANIZATION, or the legal existence of the corporation, if there be a law which authorized the corporation.

ACTION to recover possession of certain land. The facts are stated in the opinion.

*John R. Coffroth*, for the appellant.

By Court, WORDEN, J. This was action by Snyder against Studebaker, to recover possession of a certain tract of land. Judgment for the defendant.

The same question is presented by the pleadings and the evidence.

It appears that in March, 1853, the plaintiff, who was then the owner of the land, conveyed the same to the Fort Wayne and Southern Railroad Company, by deed duly executed and delivered.

This conveyance was made on account of a stock subscription.

Afterward, in November, 1855, the railroad company, for a valuable consideration, conveyed the premises to the defendant.

The Fort Wayne and Southern Railroad Company was chartered by an act of the legislature, passed in 1849; and it appears that the corporators named in the act in question met in the town of Bluffton, in said county of Wells, on the nineteenth day of November, 1851, and then and there accepted the act of incorporation, and organized the company pursuant to the provisions of said act.

If the corporation was not created before the 1st of November, 1851, when the new constitution took effect, it could have no existence at all, as that instrument prohibits the creation of corporations other than banking, by special act: *State v. Dawson*, 16 Ind. 40; *Harriman v. Southam*, Id. 190.

The plaintiff claims that, inasmuch as there was no acceptance of the charter, or organization under it, until after the adoption of the constitution of 1851, there was no such corporation as the Fort Wayne and Southern Railroad Company at the time he executed the conveyance, and hence that no title passed from him. But is he in a condition to dispute the existence of the corporation at the time he made his conveyance to it?

It has been held in numerous cases in this state that a party who has contracted with a corporation as such, is, as a general proposition, estopped by his contract to dispute the existence of the corporation at the time of the contract. The following cases may be cited, though there are, perhaps, others reported, and some not reported as yet: *Judah v. American Live-stock Ins. Co.*, 4 Ind. 333; *Brookville and Greensburg Turnpike Co. v. McCarty*, 8 Id. 392 [65 Am. Dec. 768]; *Ensey v. Cleveland and St. Louis R. R. Co.*, 10 Id. 178; *Fort Wayne and Bluffton Turnpike Co. v. Deam*, Id. 563; *Jones v. Cincinnati Type Foundry Co.*, 14 Id. 89; *Hubbard v. Chappel*, Id. 601; *Evansville R. R. Co. v. Evansville*, 15 Id. 395; *Meikel v. German Savings Fund Society*, 16 Id. 181; *Heaston v. Cincinnati and Fort Wayne R. R. Co.*, Id. 275 [79 Am. Dec. 430].

The doctrine is by no means confined to the state, but prevails elsewhere: *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238 [7 Am. Dec. 459]; *All-Saints' Church v. Lovett*, 1 Hall, 191; *Palmer v. Lawrence*, 3 Sandf. 161; *Eaton v. Aspinwall*, 6 Duer, 176; *Jones v. Bank of Tennessee*, 8 B. Mon. 122; *Worcester Medical Institution v. Harding*, 11 Cush. 285; *Congregational Society v. Perry*, 6 N. H. 164 [25 Am. Dec. 455]; *People's Savings Bank v. Collins*, 27 Conn. 142; *West Winsted*

*Savings Bank v. Ford*, Id. 282 [71 Am. Dec. 68]; Angell & Ames on Corporations, sec. 94.

The estoppel arises upon matter of fact only, and not upon matter of law. Hence, if there be no law which authorized the supposed corporation, or if the statute authorizing it be unconstitutional and void, the contract does not estop the party making it to dispute the existence of the corporation. But if, on the other hand, there be a law which authorized the corporation, then, whether the corporators have complied with it, so as to become duly incorporated, is a question of fact, and the party making the contract is estopped to dispute the organization or the legal existence of the corporation. This proposition is substantially stated in the cases of *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89; *Meikel v. German Savings Fund Society*, 16 Id. 181; and *Heaston v. Cincinnati and Fort Wayne R. R. Co.*, Id. 275 [79 Am. Dec. 430].

Let us apply the doctrine to the case before us. The corporators named in the act to establish the Fort Wayne and Southern Railroad Company had a right, at any time before the offer of the franchises was withdrawn, that is, before the constitution of 1851 was adopted, to accept the charter and organize under it. If they did so accept the charter, and organize, the corporation was legitimately created, and the new constitution did not destroy it.

Whether they did so accept the charter, and organize, was a question of fact, and the plaintiff, by his conveyance, is estopped to deny such acceptance and organization.

That the corporators accepted the charter, and organized under it, within the time when it was competent to do so, was as fully admitted by the contract as was any other step necessary to an organization.

The conclusion necessarily follows that the plaintiff is estopped to dispute the existence of the corporation at the time of his conveyance to it.

This point was ruled the other way in the case of *Harriman v. Southam*, 16 Ind. 190; but upon more mature reflection we are satisfied that the decision upon this point was wrong, and should be overruled.

We may remark, also, that the doctrine of estoppel was erroneously applied in the case of *Evansville R. R. Co. v. Evansville*, 15 Ind. 395. There the point made was, that the law under which the corporation was organized was unconstitutional and void. A party, we have seen, does not, by his

contract, estop himself to deny that there is any law, or any valid law, by which the corporation was authorized.

Some further observation in respect to the case before us will not be out of place. The doctrine of estoppel, as applied to the case, does not rest upon a mere technical rule of law. It has its foundation in the clearest equity, and the principles of natural justice. The doctrine of estoppel *in pais* is of comparatively recent growth, but is firmly and clearly established. "The recent decisions of the courts, both in this country and in England, appear to have given a much broader sweep to the doctrine of estoppel *in pais* than that which formerly existed; and to have established that in all cases where an act is done, or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, there the character of an estoppel will be given to what would otherwise be mere matter of evidence, and it will, therefore, become binding upon a jury, even in the presence of proof of a contrary nature": 2 Smith's Lead. Cas., 1st Am. ed., 531. See also upon this subject, *Kinney v. Farnsworth*, 17 Conn. 355; *Middleton Bank v. Jerome*, 18 Id. 443; *Laney v. Laney*, 4 Ind. 149. In *Den ex dem. Richman v. Baldwin*, 21 N. J. L. 397, it was said that "the doctrine of estoppel rests upon the principle that when one has done an act, or made a statement, which it would be a fraud on his part to controvert or impair, and such act or statement has so influenced any one that it has been acted upon, the party making it will be cut off from the power of retraction. It must appear: 1. That he has done some act, or made some admission inconsistent with his claim; 2. That the other party has acted upon such conduct or admission; 3. That such party will be injured by allowing the conduct or admission to be withdrawn." Here the plaintiff, by his conveyance to the corporation, admitted that it had an existence, and could receive the title. Upon this act and admission of the plaintiff, the defendant has acted in purchasing the land of the company. If the plaintiff had not conveyed to the corporation, the defendant would not have purchased from it. The law will not now permit the plaintiff to withdraw the admission made by him in conveying to the corporation, and deprive the defendant of the land which he purchased on the faith of such admission.

In our opinion, the judgment below is right, and must be affirmed.

The judgment is affirmed, with costs.

**ESTOPPEL TO DENY CORPORATE EXISTENCE BY CONTRACTING WITH CORPORATION:** See *Yard v. Pacific Mut. Ins. Co.*, 64 Am. Dec. 467; *Brookville etc. Turnpike Co. v. McCarty*, 65 Id. 768, and the notes thereto; note to *Robertson v. American Homestead Association*, 69 Id. 165; *West Winsted Savings Bank v. Ford*, 71 Id. 66; *Anderson v. Newcastle etc. R. R.*, 74 Id. 218; *Heaston v. Cincinnati etc. R. R.*, 79 Id. 430. A person who contracts with a corporation as such, when sued upon his contract, is estopped to deny the existence of the corporation at the time of making the contract: *Vater v. Lewis*, 86 Ind. 291; *Baker v. Neff*, 73 Id. 70; and see *Maxon v. Lane*, 102 Id. 371, all citing the principal case. In *Bennett v. Black*, 19 Id. 481, the judgment was affirmed for the reasons given in the principal case.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IOWA.**

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**LONG v. BURNETT.**

[18 IOWA, 28.]

**POWERS OF SPECIAL ADMINISTRATOR** under Iowa revised laws of 1843 are limited to the preservation of personal property of the decedent until a regular administrator can be appointed, and an order of the probate court directing the sale of real estate by a special administrator would, under such statute, be without authority of law and void, and the regularity of such an order, and the proceedings thereunder, may be collaterally impeached.

**JURISDICTION OF PROBATE COURT OVER SETTLEMENT OF ESTATES OF DECEDENTS** attaches and becomes effective only upon the granting of letters of administration; and the power to make an order directing the sale of real estate for the payment of debts arises only upon the presentation by the legal and regular administrator of the petition prescribed by law.

**PRESENTATION OF PETITION FOR ORDER TO SELL DECEDENT'S REALTY** for payment of debts by administrator, confers upon the court jurisdiction of the subject-matter, and its subsequent proceedings will be presumed to be as regular and conclusive as those of courts of general jurisdiction. And the action of the court will not be collaterally reviewed when the jurisdiction so far attaches as to require the court to hear and determine the sufficiency of the facts relied upon to confer such jurisdiction, whether they relate to the law, the process, the notice, or the petition.

**TAX DEEDS, WHEN REGULARLY EXECUTED,** ARE PRIMA FACIE EVIDENCE of the regularity of all prior proceedings in the levy of the tax, and the sale of the property, under the Iowa revenue law of 1841; and when such deeds are attacked, the burden of showing failure to comply with the requirements of the law in such proceedings is upon the party making such attack. When, however, no record of the tax levy or sale exists, the burden of proof is on the party claiming under the deed.

**FAILURE TO RECITE IN TAX DEED ONE OF REQUISITES TO VALID LEVY OF TAX,** where all the other essential requisites are set out, is evidence by implication that the requirement not recited was not complied with.

**ACTION of right.** The opinion states the facts.

*Grant and Smith*, for the appellants.

*Richman and Brother*, for the appellee.

By Court, **LOWE, J.** An action of right. On the trial before the court, the title and right of possession in the premises were adjudged to be in plaintiffs. In seeking a revision of this judgment, the defendant insists that the court below committed an error in excluding from its consideration the evidence of his title to the land in controversy, consisting—

1. Of two deeds of conveyance, one from Benjamin S. Olds, special administrator, dated January 3, 1846, to Amos E. Kimberly; the other from said Kimberly to the defendant, dated January 9, 1850; both duly recorded, and upon their face regularly executed. Their admissibility as evidence of title in the defendant depends upon the question whether the judge of probate, under the revised statutes of 1843, had the power and authority to license a special administrator to sell the land of a decedent to pay claims against the estate. The circumstances under which this had been done are developed in the documentary and record evidence contained in the bill of exceptions accompanying the record in this case.

It seems that the plaintiffs are the devisees of Robert Long, who, in 1843, died seised in fee of the land in controversy, in the state of Ohio, making a will, but appointing no executor. Afterward, in 1844, the will was duly probated, and one Peter Igow was appointed administrator with the will annexed. Afterwards, Igow came to this state and applied to the judge of probate of Muscatine County for letters of administration, representing that there was personal property in said county belonging to the estate, and upon which the will operated. On account of some informality in the authentication of his papers, his application was refused.

But the judge of probate, being advised that the property was in danger of being lost, unless it received immediate care, upon request, appointed Benjamin S. Olds a special administrator (as he had the power to do under the statute) to take possession of and preserve the same until a regular or general administrator could be appointed. To this extent were his duties as special administrator specified by his letters under which he was commissioned to act, and it is proper to remark that the conditions of his bond were restricted to the same duties. Nevertheless, in November thereafter (1845), being

unable to find or successfully to obtain any assets belonging to said estate, but having incurred certain expenses in attempting to do so, he petitioned the probate court to sell the land in controversy to defray said expenses. The license was granted, and the sale ordered, which took place on the third day of January, 1846. Amos E. Kimberly became the purchaser at \$201, to whom the said Olds made a deed of conveyance. This deed constitutes one of the sources of the defendant's title, having derived from Kimberly whatever title he had obtained by his purchase at the alleged administrator's sale.

The exclusion of these deeds on trial below by the court is now pressed as matter of complaint. But we are not prepared to gainsay the correctness of this ruling. They were offered to prove title in the defendant. Their admissibility for that purpose depends entirely upon the question whether the judge of probate possessed the power, under the law at the time, to license any one, except an administrator proper, to sell land to pay the debts of the estate. If he had not, all the proceedings in the premises were void.

The statutes of 1843, page 677, very clearly define the extent of the particular powers and duties of a special administrator, showing, in the first place, that his appointment is contingent, and can only be made when for some cause, such as the pendency of a suit concerning the proof of a will, or some other cause, regular administration is delayed. His functions are limited to a few prescribed duties in relation to the preservation of the personal assets, and these cease as soon as a regular administrator is appointed. He cannot be sued. The statute of limitations does not run against the creditors of the estate during the period of his agency. He is simply an agent, and not an administrator. He has no power to settle the estate; much less power to sell land for any purpose. It was no more competent for the judge of probate to grant him license to sell land than that of any third person. His act in doing so was extrajudicial, and void. The judge's power over the real estate of deceased persons is derived through the medium of regular administration. This was wanting in the case before us. Hence his jurisdiction did not, as it could not under the circumstances, attach. The argument, therefore, that the regularity of these proceedings could not be collaterally attacked has no proper foundation. The law confers upon judges of probate jurisdiction over the settlement of the estates of decedents. This jurisdiction, however,

only attaches and becomes effective after granting letters of administration to some one who is to exercise all the powers and duties of a regular administrator. This done, the power to grant a license to sell real estate to pay debts, nevertheless does not arise till a petition, as the law directs, is presented by a legal administrator. When such a petition is presented, jurisdiction over that particular subject is acquired, and the subsequent proceedings, although those of a court of inferior and limited powers, will be presumed as regular and conclusive as those of courts of general jurisdiction, and shall not be collaterally assailed. This, we suppose, is familiar law, but the presentation of a petition in this class of cases is not enough; it must be done by an administrator in the full statutory meaning of such a commissioned agent, and it is the union of both of these elements that constitutes the jurisdictional fact upon which the power of the court to act in the premises is made to depend, and they should both appear of record. So far, however, from this being the case, the record affirmatively shows that the petition was not presented by an administrator, but by a person who had no power whatever under the law to act, when the prayer of the petition was granted. And it is this feature of the case that distinguishes it from all the cases cited by counsel for the defendants.

Some of these cases referred to arose in courts of general jurisdiction, where every intendment of the law is in favor of their proceedings, and of their jurisdiction. Other references, to be sure, are to the proceedings of inferior courts, with limited jurisdiction. But in all these cases the jurisdiction had so far attached as to require and authorize the court to hear and determine the sufficiency of the facts relied upon to give jurisdiction, whether they related to the law itself, the process, the notice, or the petition. Take, as an illustration, the case of *Morrow v. Weed*, 4 Iowa, 77 [66 Am. Dec. 122], which is a very fair type of the principle involved in this class of cases. In that case there was a petition by an administrator proper for leave to sell the real estate, but the petition did not state the value of the personal property, as the statute required, and it was claimed that this statement was essential in order to confer jurisdiction, for it was insisted that without such statement the court could not determine whether the personal estate was insufficient to pay the debts of the deceased. It will be perceived that this objection goes a step further than the case at bar. It is based upon the idea that before a petition, presented

by the right person, can give jurisdiction, it must also contain a statement of these facts required by the statutes. But the court in that case substantially, and we think properly, held that the power or jurisdiction of the court was called into action by the presentation of the petition—of course presented by the proper person; in that case there was no pretense that the petition was presented by any other than an administrator. And if, in exercising its power, the court should err in pronouncing the petition sufficient, when it was insufficient, or committed any other irregularity, it did not thereby lose again its jurisdiction, but that all such errors are to be corrected in a direct proceeding by appeal, and cannot be taken advantage of collaterally.

It is difficult to supply a rule under which to determine definitely what are or what are not jurisdictional facts, or in other words, just when the jurisdiction of a court attaches in a given case. The case of *Morrow v. Weed*, 4 Iowa, 77 [68 Am. Dec. 122], and the case of *Cooper v. Sunderland*, 3 Id. 114 [68 Am. Dec. 52], have gone as far to sustain guardian and administrator's sales as the courts generally in this country have done.

Yet, between the class of jurisdictional questions presented in these cases, and also in most of the cases cited by the defense, and the one raised at bar, there is a clear distinction. In the latter, the want of jurisdiction, for the reasons before stated, is obviously apparent upon the face of the proceedings. In such a case, all presumptions are rebutted, and we are not allowed to indulge them. And this rule, in our opinion, is applicable in courts of superior as well as inferior jurisdiction. It follows that the proceedings under the unauthorized license of the judge of probate were nullities, and that the deeds in question were properly excluded.

2. But the defendant offered some other evidence of title, founded upon a tax sale which took place on the tenth day of April, 1843, for the delinquent taxes of 1841 and 1842. The certificate of purchase was originally issued to William H. Tuthill, Esq., by him assigned to Stephen Whicher, who assigned the same to Amos E. Kimberly, to whom the deed was made on failure to redeem, and from whom the defendant derived whatever title it conveyed. The deed thus offered was unobjectionable in form, and by the revenue law of 1841, under the provision of which the sale took place, it was made *prima facie* evidence of the regularity of the sale. This feature

of the revenue law of 1841 materially changes the rule generally adopted by the courts, that the party who sets up a title under such a sale must furnish the evidence necessary to support it, independent of his deed, by showing that every prerequisite of the law had been complied with in conducting the sale. This provision of the statute shifts the burden of rebutting the presumption of regularity upon the plaintiff.

Inasmuch as the court ruled against the defendant's title derived from this source, he must have found that the facts and circumstances developed by the evidence were sufficient to overcome the *prima facie* title made by the deed. Let us see what the plaintiff's evidence was in this respect. Ordinarily, we suppose, his method would be to show from the records and files of the collector's office, that in selling the land for the non-payment of taxes, there had not been a strict compliance with the requirements of the law. But this privilege was not accorded to him, for the reason no such record or files were *in esse*, or could be found in the collector's office. His witness, H. C. Pratt, testified that he had been treasurer and recorder of Cedar County for six years, during which time he took occasion to examine said office for the record evidence of the sales made by the collector for the taxes of 1841, and that he was unable to find any record evidence whatever of a sale for the taxes of 1841. That he had carefully and cautiously looked with reference to the pendency and object of this suit, and all that could be found was an entry of an order that there should be a tax of a certain amount levied for the year 1841, but no entry or evidence of a tax sale.

Samuel Wampler also testified that he was at that time treasurer and recorder of said county; that he had examined all the records back to the year 1841; that he found nothing indicating a tax sale in 1843, for the delinquent taxes of 1841 and 1842, not even a memorandum in regard to it. In this attitude of the case, what should be the effect of such testimony?

We are inclined to think that it must *ex necessitate* reshift the burden of proof upon the defendant, to account for the absence of this record evidence, or otherwise show from evidence *aliunde* that all the conditions or prerequisites of the law had been strictly observed in making the sale. Some rule must be adopted in cases of this kind, and we cannot perceive why the one suggested is not sound and reasonable. Surely it is much easier for the ministers of the law to show that cer-

tain steps had been taken, or for the purchaser to collect and preserve all the facts and muniments of title on which the validity of his claim depends, than for the tax-payer or original owner to show that the provisions of the law had not been complied with. Indeed, this would be throwing upon the plaintiff the hardship of proving a negative, in this case, when the record evidence had never been filed, or if so, had been removed. It is apparent that in every such case the original owner would be wholly without protection.

Now in answer to the above proof the defendant fails to account satisfactorily for the non-existence of the collector's notice and return of said sale, or other record evidence of the same, but he does undertake to supply some evidence of the same by Judge Tuthill, who stated that he purchased the property in controversy, that from certain circumstances mentioned he remembered seeing the delinquent list, and the warrant authorizing the sale, etc. Yet this goes a very short way in showing, as we think he was bound to do under the circumstances of this case, that the several steps prescribed by the statutes had been strictly followed.

It is true, the defendant's deed undertakes to recite a compliance with the statutory provisions, but these recitals are not evidence against the owner of the property sold: *Sharp v. Speir*, 4 Hill, 76; *Striker v. Kelly*, 2 Denio, 323; *Beckman v. Bigham*, 5 N. Y. 366; *Hoyt v. Dillon*, 19 Barb. 644.

The deed shows that it had been drawn with great care and particularity, evidently indicating that the writer intended to set forth all that he thought the law required the officer to do in selling land for delinquent taxes, yet he did omit one requisite, that of stating, "after the clerk and assessor had corrected the assessment roll and laid it before the board of commissioners, the said board, finding it correct, had accepted the same in writing on the back thereof, signed and attested by their clerk, and filed in his office." A failure to make this statement in an undertaking to recite all the facts, is evidence, by implication, that it never had been done; if so, the omission vitiated the sale, and repels the *prima facie* force of the deed, according to authority of the case of *Rayburn v. Kuhl*, 10 Iowa, 92, which case turned alone upon this point.

The appellees make several other points against the validity of this tax title, the consideration of which we waive, except one, and that is this: The evidence shows that the certificate of purchase of the land in controversy by Tuthill was assigned



by him to Whicher, before the two years in which to redeem had run out, and that Whicher at that time was the acting attorney for the estate of Robert Long, deceased; that he stated to Tuthill at the time he purchased the certificate, that he stood in the place of the deceased, and represented the estate, yet he took the assignment to himself. It is insisted that this assignment in law inures to the benefit of the estate, under the circumstances. Payment of taxes, or the redemption of land sold for the non-payment within the prescribed time, is always a good defense against a tax title. Whether the estate of Long did redeem the land in question through Mr. Whicher, the attorney, is chiefly a question of fact, which it was competent for the court below to pass upon, but is not for us. We only refer to it as showing another probable reason, in the mind of the court below, for ruling against the defendant's title.

It only remains to say, that at the trial below it was admitted that the legal title of the land in dispute was in Robert Long at the time of his decease, and that it was still in the plaintiffs, his heirs, unless it had been divested by the defendant's several title deeds offered in evidence.

The court below held that it had not been, and such is our opinion.

Judgment affirmed.

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**JURISDICTION OF PROBATE COURTS, WHEN ATTACHED, AND WHETHER GENERAL OR SPECIAL:** See *Cooper v. Sunderland*, 66 Am. Dec. 52; *Morrow v. Weed*, Id. 122; *Overseers v. Gullifer*, 77 Id. 265.

**WHERE JURISDICTION OF COURT HAVING LIMITED POWERS IS SHOWN** to have attached, its subsequent proceedings are presumed to be as regular as those of a court of general jurisdiction: *Danforth v. Thompson*, 34 Iowa, 245; *Smith v. Engle*, 44 Id. 268; and cannot be questioned collaterally: *Pursley v. Hays*, 22 Id. 20; *Shawhan v. Loffer*, 24 Id. 227; *Good v. Norley*, 28 Id. 195, all citing the principal case.

**POWER OF PROBATE COURT TO SELL REALTY RESULTS** from the fact that decedent's personal estate is insufficient to pay debts, and that the realty is necessary therefor: *Stuart v. Allen*, 76 Am. Dec. 551; *Root v. McFerrin*, 75 Id. 49; and jurisdiction attaches on presentation of a petition therefor by the administrator. But such court has no authority to entertain a bill by creditors to compel the administrator to sell: *Waples v. Marsh*, 19 Iowa, 386, citing the principal case.

**RECEIPTS IN TAX DEEDS AS EVIDENCE:** See the extensive note to *Jackson v. Shepard*, 17 Am. Dec. 505-514; and see *Worthing v. Webster*, 71 Id. 543.

## WILKINSON v. GETTY.

[18 IOWA, 157.]

**NON-EXECUTION OF POWER CANNOT BE AIDED BY PROOF OF INTENTION TO EXECUTE IT.** Thus, if an attorney in fact, acting under a power of attorney, executed by both husband and wife, sign a deed of conveyance as the attorney of the husband only, the deed will operate to convey only the husband's interest, and will not bar dower of the wife; and the failure to execute the deed as the attorney of the wife cannot be aided by evidence showing a mistake on the part of the attorney in drawing the deed.

**BILL** in equity. John Getty, the owner in fee of a lot in Davenport, with his wife Harriet, executed a power of attorney to one Collins, empowering him in their name to sell and convey this lot. Collins sold the property to one Ranson, and afterwards undertook by deed to convey the same to one Price, the assignee of Ranson. This deed was signed, "Wm. S. Collins, attorney in fact for John Getty." Price, the assignee, sold to Pages, under whom complainant claims. Getty died in 1858, eight years after the sale and deed, leaving Harriet surviving. This bill is filed against the widow and heirs to perfect the title. The court sustained the bill against the heirs, but dismissed as to said Harriet, and from such dismissal complainant appeals.

*Davison and True*, for the appellant.

*Thompson and Barner*, for the appellees.

By Court, **WRIGHT, J.** This decree must be affirmed. The wife never signed the deed. Nor (granting that this could avail complainant) is there any sufficient evidence that she ever intended to, either by her attorney in fact, or otherwise. It is not different from the ordinary case, where the husband makes a deed in which the wife does not join. Her dower, in such a case, is not barred by even a superabundance of proof that the grantee believed and expected that she was signing it; that she was willing to sign it at the time, and would have done so, if required; nor by evidence that a full consideration was paid, and possession taken under the deed. In this instance, it is simply a case of the non-execution of a power, and this cannot be aided by proof of an intention to execute it.

It is not a case of mistake, relievable in equity. Respondent was a *feme covert*, and her dower could only be barred by

her voluntary act or conveyance in the manner provided by statute. And when required to be in writing, the failure cannot be aided by parol evidence that all that the statute required was in fact done: *O'Ferrall v. Simplot*, 4 Iowa, 881, and cases there cited. And see *Pierson v. Armstrong*, 1 Id. 282 [63 Am. Dec. 440]. And much stronger is the reason of the rule, when she never signed nor acknowledged the deed.

Counsel say that equity will especially grant relief and correct a mistake, when the deed is executed in the name of the attorney, instead of the principal. We know of no such rule in the form stated. Nor, if correct, could it avail complainant. The author, in 1 Am. Lead. Cas. 585 (referred to by counsel in support of this doctrine), is treating of cases where equity will aid the defective execution of a power, and refers to instances where deeds are by mistake signed, sealed, and delivered in the name of the attorney, instead of the principal. And the rule is broadly stated that an agreement by an attorney for a principal, inoperative at law for want of a formal execution in the name of the principal, is binding in equity, if the attorney had authority. But not so, if the agreement was never executed, formally or otherwise, in the name of the principal, nor any person for him. And this is the case before us.

But it is insisted that Collins made to the vendee a bond executed in the name of the husband and wife, and that equity will enforce this agreement. Of the execution and true character of this bond, there is no sufficient evidence. To obtain relief upon this ground, complainant's proof of the contract should be clear, definite, and unequivocal. The alleged bond is not produced, and the evidence of its terms and contents falls far short of what legal rules require.

Affirmed.

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THE PRINCIPAL CASE IS CITED in *Simms v. Hervey*, 19 Iowa, 286, to the point that married women can only convey in the manner and form provided by statute; and in *Heaton v. Fryberger*, 38 Id. 201, to the point that a mistake in the manner of executing such conveyances cannot be corrected in equity.

## ALDEN v. CARVER.

[13 IOWA, 253.]

**PLAINTIFF IN REPLEVIN, TO RECOVER, MUST PROVE** that he was entitled to the possession of the property in controversy at the commencement of the action.

**WAREHOUSEMAN WITH WHOM COMMON CARRIER STORES GOODS** may retain possession of the same, when so instructed by the carrier, until "back charges" thereon are paid.

**REPLEVIN.** Plaintiffs shipped goods from St. Louis, by the Hannibal and St. Joseph Railroad Company, under a contract to take them at the place of shipment and deliver them at their destination, Council Bluffs, Iowa. At St. Joseph, the goods were placed on the steamer *Dacotah*, for carriage to their destination. Defendant was a warehouseman at the Council Bluffs landing, and the goods were left with him at that place, with instructions to collect the back charges, amounting to \$248. His charges for storage amounted to thirty dollars, which was paid after suit commenced, and a demand then made for the goods. Verdict and judgment went for defendant for the amount of the back charges and interest. Plaintiffs appealed.

*Clinton and Tuttle*, for the appellants.

*Street and Crawford*, for the appellee.

By Court, **WRIGHT, J.** That plaintiffs were not entitled to the possession of the goods at the time this action was commenced, and that as a consequence the verdict against them upon that issue is correct, we entertain no doubt. And this, for the reason that while they did not and do not controvert the right of defendant to a lien on the goods until his charges as warehouseman were paid, and his right to retain their possession until such payment, the testimony is quite conclusive that such charges were not paid, and that there had been no demand until after the writ was issued. The petition was filed, the writ issued and placed in the hands of the sheriff; and after the officer, with his writ, and the plaintiffs had got to defendant's warehouse, the demand was made and charges paid. At the time the action was commenced, therefore, defendant was not in the wrong, and plaintiffs were not entitled to the possession of the property.

It is admitted that plaintiffs own the goods. The question in controversy (aside from that above decided) is, whether de-

defendant had a right to retain their possession until the back charges were paid. There was no evidence that these had been paid by the plaintiffs. Nor does it appear that the amount found by the jury was any greater than what was due to the carriers, with whom the contract was made. The amount due the steamer was paid by the railroad company. The defendant paid no back charges. From the pleadings, evidence, and instructions, it seems that plaintiffs denied their liability to pay the steamer's charges; they insisting that they contracted with the railroad company, and the goods were shipped upon the boat without their consent, express or implied. But this amount having been paid by the first carriers, we do not see how this claim of plaintiffs can avail them. True, it was paid after the commencement of the action; but while this is set up in a supplemental pleading, and issue thereon joined, it is nowhere, during the whole trial, intimated that the time of payment would change or affect defendant's rights. Indeed, it may be remarked that aside from the petition, the pleadings and proceedings are strangely in conflict with the positions now assumed by the parties respectively. Thus it is claimed that the *Dacotah* could not recover her charges, because she obtained possession of the goods without plaintiffs' consent, and that to entitle the common carrier to a lien for freight, the relation of debtor and creditor must exist between the owner and such carrier, so that an action of law might be maintained for the debt sought to be enforced by the lien.

And yet, if this rule should be granted to its fullest extent, as fully as laid down in *Fitch v. Newberry*, 1 Doug. (Mich.) 1 [40 Am. Dec. 33], it could make no difference, for such charges are not owing, nor claimed by the boat, but by the party with whom the contract of affreightment was originally made. And there is no dispute but what the relation of debtor and creditor existed between plaintiffs and the company. And then, again, while the judgment for all the back charges in favor of defendant, who had paid nothing, may seem strange, yet when it is remembered that the parties made up the issues, and tried the whole case as if the carriers, one or both, were suing for the freight, and that there was no question made but that defendant might recover for whatever was due, we have a satisfactory explanation. And therefore, while under other circumstances we might incline ever so strongly to the views presented by appellants, upon some of the errors assigned, yet

as the record stands we do not see how we can consistently disturb the judgment.

Affirmed.

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REFLEVIN IS MAINTAINABLE ONLY BY ONE WHO IS ENTITLED TO IMMEDIATE POSSESSION: *Richardson v. Reed*, 64 Am. Dec. 80; and see the principal case cited to this effect in *Marshall v. Bunker*, 41 Iowa, 123.

LIEN OF COMMON CARRIER FOR FREIGHT CHARGES, and his right to withhold possession until payment thereof: See *Galena and O. U. R. R. Co. v. Eas*, 68 Am. Dec. 574, and note.

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## GRAYDON, SWANWICK, & Co. v. PATTERSON & Co.

[13 IOWA, 254.]

HOLDER OF PROMISSORY NOTES IS NOT BOUND TO RECEIVE IN PAYMENT of the same, currency or any thing other than coin or money at its true value; and holder, who is mere agent, has no right, unless specially authorized so to do, to accept anything else in lieu of money; and a payment in currency to the holder, who is merely an agent for collection, does not, in the absence of authority specially conferred or ratified, or of a custom known to the principal, amount to a discharge of the notes.

ACTION on note payable on order of Graydon, McCreary, & Co., at Langworthy and Brothers' bank, and indorsed in blank and delivered to plaintiffs. Before maturity it was sent to the bank for collection, and there paid by defendants by a currency check, the bank giving a receipt for the amount of the note, without stating in what manner the payment had been made. There had been no instructions as to the manner of collection of the note. It was proved that it was the custom of the bank to receive payments in currency. The check or currency were never tendered back to defendants. The remaining facts appear in the opinion.

*Bissell, Mills, and Shiras*, for the appellants.

*J. M. Griffith and W. J. Knight*, for the appellees.

By Court, WRIGHT, J. There is no pretense that plaintiffs accepted the currency, nor that they had any knowledge of the check drawn by the defendants for the same. Nor is it shown that they had any knowledge of the custom of the bank referred to in the testimony. It is equally clear, we think, that while the note was indorsed in blank, defendants were aware that it belonged to plaintiffs, and that Langworthy and Brothers were merely collecting agents. Plaintiffs were

therefore not required to return the check, unless they are bound by the act of the bank in taking it, and if they are, then the note is paid, and a return would be unavailing.

Our opinion is, that unless authorized to receive currency, or unless the act was subsequently in some manner ratified, the bank had no authority to take it, and the note would not be paid. The rule is, that payment should ordinarily be made in money or coin, and the holder is not bound to accept anything but such money at its true value. And if the holder is a mere agent, he has no right, unless specifically authorized so to do, to accept anything else in lieu of money: *Story on Promissory Notes*, secs. 115, 389; *Jackson v. Bartlett*, 8 Johns. 361; *Kellogg v. Gilbert*, 10 Id. 220 [6 Am. Dec. 335]; *Caster v. Talcott*, 10 Vt. 471; *McCarver v. Neally*, 1 G. Greene, 360; 2 *Parsons on Contracts*, 126, note b.

"Illinois currency," or "currency," is not money: *Rindskoff v. Barrett*, 11 Iowa, 172. And aside from some custom authorizing it, authority from the payees to that effect, or ratification, as above explained, the agents had no right to receive such "currency," or anything else than money.

Affirmed.

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HOLDER OF NOTE FOR COLLECTION, IF AGENT OR ATTORNEY, HAS NO RIGHT to receive in payment anything except money, unless specially authorized so to do by his principal or client: *Drain v. Daggett*, 41 Iowa, 683. The only condition the law imposes, if anything else is received in such cases, being that the principal shall inform the debtor, within a reasonable time after the fact is brought to his attention, that he refuses to sanction such transaction: *Ward v. Smith*, 7 Wall. 452, both citing the principal case.

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## DEAN v. GODDARD.

[13 IOWA, 292.]

EXECUTION SHOWING THAT JUDGMENT UNDER WHICH IT WAS ISSUED WAS recovered "before G. S. M.," without stating that he was a justice of the peace, would not be absolutely void in the hands of a constable, so as to enable him to protect himself from liability on his bond for improper or negligent treatment of property seized or levied upon by virtue thereof.

ACTION against Goddard, a constable, and his sureties, upon his official bond, for improperly levying upon plaintiff's property under an execution reciting that it was issued on a judgment recovered "before George S. Matthews," but failing to recite his office of justice of the peace. The remaining facts appear in the opinion.



*John E. Burke*, for the appellant.

*J. C. Wright and L. L. Ainsworth*, for the appellee.

By Court, WRIGHT, J. The writ was held void, for the reason that it did not "show that it was issued upon a judgment rendered by an officer." And this ruling, we think, was erroneous. The failure to attach the words "justice of the peace," or the letters "J. P.," to the name of the person rendering the judgment, would not have the effect of rendering the writ absolutely void in the hands of the constable, so as to enable him to protect himself for his improper or negligent treatment of property seized or levied upon by virtue thereof. The defendant in the execution might claim that it was irregular and voidable, perhaps, but not void. If not void as to the defendant, the defect certainly could not avail the constable, nor his sureties, after he had acted upon it as a valid writ, and suffered property seized thereunder to perish because of his abuse of the same.

It was the duty of Matthews, upon the expiration of his term of office, to deposit with his successor his official dockets and papers, to be kept as public records. His successor was invested with power to issue executions on judgments found unsatisfied in the dockets, thus coming into his hands, in the same manner and with like effect as the justice rendering the same: Code 1851, secs. 2377-2379, 2387. And though it would be more strictly proper and regular that the official character of the justice or person rendering the judgment should be expressly stated, yet this clerical omission will not vitiate nor make void the writ, for its basis, purpose, and object sufficiently appear, and especially so, as the justice issuing it is a sworn public officer, and some presumptions may be legitimately indulged in, where he is in the discharge of a duty enjoined by law. Not only so, but the execution so describes and identifies the judgment as to render certain the authority upon which it was issued, and was therefore sufficient to invest the officer with power to levy and sell. If so, it would not be void: *Sprott v. Reid*, 3 G. Greene, 489 [56 Am. Dec. 549]; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Elliot v. Kronk's Ad'mr*, 13 Wend. 35.

Again, it may be questioned whether, under the state of the pleadings, the objection, if good upon general principles, could avail. After admitting the judgment, execution, and levy, an answer was filed denying the same matters. There was no

withdrawal of the first, no substitution, no leave to file an additional or further answer, nothing indicating that the several answers were to be treated as one, but the cause was tried upon the issues thus made up, though clearly conflicting and inconsistent. Under such circumstances, we regard it very doubtful whether defendants were not estopped from denying the authority for issuing the writ. But holding as we do above, it is not necessary to pass upon this view of the case.

Reversed.

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VARIANCE BETWEEN EXECUTION AND JUDGMENT: See extensive note to *Graham v. Price*, 13 Am. Dec. 201, 203; *Sprott v. Reid*, 56 Id. 549, and note 556. Immaterial variances will not affect the validity of the writ, and if, when viewed in the light of a common understanding, all the requisites substantially appear therein, it will be sufficient: *Burdick v. Shigley*, 30 Iowa, 65, citing the principal case. The principal case is also cited in *Cooley v. Brayton*, 16 Id. 15, where the defect, which was held to be immaterial, consisted merely of clerical misprision in omitting to fill a blank with the amount of the execution, such sum already appearing twice therein; and in *Cunningham v. Felker*, 26 Id. 119, and *Williams v. Brown*, 28 Id. 249, where slight variance between the sums named in the judgment and execution were held to be immaterial.

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## KURZ v. BRUSCH.

[18 IOWA, 871.]

**HOMESTEAD EMBRACES LOT AND HOUSE USED AS HOME**, together with buildings appurtenant thereto, including those used and occupied by the owner in the prosecution of his ordinary business, but not such buildings as are rented to others and yield a revenue to the owner.

**OCCUPATION OF BUILDING AS HOMESTEAD AFTER EXECUTION OF TRUST DEED** conveying the same, in which deed the wife did not concur, will not change the status of the parties so as to exempt the property as a homestead from the operation of such deed.

**ACTION** to obtain possession of real property. Defendant, being the owner of two subdivisions of a tract, which were known as the south and south middle fifths, conveyed by trust deed to one Woodruff to secure a debt to one Ives. Under such deed the premises were sold and conveyed by the trustee to plaintiff, who commenced this action. Defendant answered, setting up the defense that the premises were his homestead. The jury found for the plaintiff for the south fifth, and that the south middle fifth was defendant's homestead. Plaintiff appealed.

*Bissell and Shiras*, for the appellant.

*E. Gottschalk*, for the appellee.

By Court, WRIGHT, J. There is no controversy as to the south fifth; nor is there any as to a portion of the south middle fifth. On the north side of this, and some distance from the front, or White Street, is a one-story brick cottage, occupied by the defendant and his family at the time of making the deed, in which deed his wife did not join. As to this cottage house and such portions of the lot (the south middle fifth) as were in good faith used as appurtenant thereto, plaintiff concedes the verdict is right. But as to all other parts of that subdivision, he insists that the verdict was wrong.

The facts are simply these: There is a double brick house situated on this lot, fronting on White Street. This was never occupied by defendant as his homestead, prior to the trust deed, nor at any time prior to the commencement of this action, except about two months in the year 1859. It was rented, however, to a number of tenants, and used as shops, defendant having no possession except through such tenants. On the south half there was a planing-mill, which was rented on the 1st of May, 1857, for five years, at an annual rent of one hundred and fifty dollars.

Plaintiff now claims that as to all said south middle fifth except the brick cottage, and such portions of the lot as were in good faith used as appurtenant thereto, he was entitled to recover. In other words, he insists that the double brick house is no part of the homestead.

The principles settled and the reasoning used by this court in prior cases, bearing more or less directly upon the question here involved, must reverse this judgment.

Thus in *Charless v. Lamberson*, 1 Iowa, 435 [63 Am. Dec. 457], it is said: "To be the homestead it must be used, and used for the purpose designed by the law, to wit, as a home, a place to abide, a place for the family. The language of the law is clear. It is that a homestead, consisting of a certain quantity of land, and the dwelling-house thereon, and its appurtenances, owned and occupied, shall not be subject to forced sale."

In *Rhodes v. McCormick*, 4 Iowa, 368 [68 Am. Dec. 663], this language is used: "The object of the law is to protect the home and preserve it for the family, and not shops, stores, rooms, hotels, and office rooms, which are rented and occupied

by other persons. This construction attains the object of the code in exempting a homestead, and prevents the abuse of a law which was designed to discourage and not encourage fraud."

And so in *Ackley v. Chamberlain*, 16 Cal. 181 [76 Am. Dec. 516]: "A homestead is the residence of a family, is the place where the home is, and it would seem unreasonable, upon first impressions, that premises should be regarded as a homestead, unless devoted principally to such residence and home."

But aside from these cases the statute, to our minds, is clear and decisive upon this point. After providing that "the homestead must embrace the house used as a home," "and if he, the owner, has two or more houses thus used by him at different times and places, he may select which he will retain"; that "it may contain one or more lots or tracts of land with the buildings thereon, and other appurtenances,"—it then declares (Code 1851, sec. 1253): "It must not embrace more than one dwelling-house, nor any other buildings except such as are properly appurtenant to the homestead as such, but a shop or other building situated thereon, and really used and occupied by the owner in the prosecution of his own ordinary business, and not exceeding three hundred dollars in value, may be deemed appurtenant to such homestead."

This section, by the assertion of what may be as well as what shall not be considered as appurtenant to the homestead, and hence a part of it, frees the question of all difficulty. The purpose and object of the law is most clearly shown. It gives the "dwelling-house" and a shop really occupied in the prosecution of his ordinary business by the owner, but not buildings that are not thus used and occupied. The mechanic needs his shop, the physician his office, to assist him in procuring means for the maintenance and support of his family, as he needs his dwelling. This is the theory of the statute, and he is protected in the one as much as the other. Or as is said by Hemphill, C. J., in *Pryor v. Stone*, 19 Tex. 371 [70 Am. Dec. 341], in giving a construction to the peculiar constitutional provisions and statutes of that state: "The exemption should not be construed as reserving merely a residence where a family may eat, drink, and sleep, but also a place where the head or members may pursue such business or avocation as may be necessary for the support and comfort of the family."

But it was never intended that other buildings, though on the same lot, buildings "not appurtenant to the homestead as

such," those not "used and occupied by the owner in the prosecution of his own ordinary business," those rented and yielding a revenue to the owner,—we say it was never intended that such should be exempt. If so, the law could be made the cloak for the most stupendous frauds. For if one such building may be exempt, so may all that could be placed upon a half-acre, if in a town, or forty acres, if in the country, without limit as to value. And thus the statute, instead of securing to the family a home where they may be sheltered, and live beyond the reach of financial misfortune and the demands of creditors, would give them property never contemplated by its letter or spirit.

The occupation of the "double brick house" after the execution of the trust deed, cannot change the legal *status* of the parties. Its subsequent adoption (even if there was such adoption), would not affect the validity of the deed, nor release the property from its operation: *Yost v. Devault*, 3 Iowa, 345 [66 Am. Dec. 92].

The cause will therefore be reversed, and remanded. So much of the south middle fifth as was in good faith actually used as appurtenant to the "cottage dwelling," at the time of the execution of the trust deed, as defined by this opinion, should be set apart to the defendant, and as to all other parts the plaintiff should have judgment.

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HOMESTEADS, WHAT MAY BE EXEMPT AS: See *Pryor v. Stone*, 70 Am. Dec. 841, and the extensive note thereto 346-353, citing many cases, and among them the principal case; *Tumlinson v. Swinney*, 76 Id. 432; *Ackley v. Chamberlain*, Id. 516.

CONVEYANCE OR ALIENATION OF HOMESTEADS: See the note to *Poole v. Gerard*, 65 Am. Dec. 482 et seq.

SUBSEQUENT ADOPTION OF REAL ESTATE AS HOMESTEAD cannot affect validity of owner's undertaking to sell and convey it, or release him from his obligations, entered into before it was made a homestead: *Yost v. Devault*, 66 Am. Dec. 92.

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## McHENRY v. DAY.

[13 IOWA, 445.]

NEGLIGENCE OF WIFE IN EXECUTING, WITHOUT READING, TRUST DEED CONVEYING HOMESTEAD, among other property, upon the statement of her husband that it conveyed certain property mentioned, which did not include the homestead, the trustee and beneficiary having no knowledge of and being in no wise a party to this false representation, cannot be set up by her as against the innocent parties who acted in good faith in the

transaction, so as to make it the ground for relief against the consequences of her own signature.

**WIFE WILL NOT BE PERMITTED TO TAKE ADVANTAGE** of her own irregular and wrongful acts in the acknowledgment of a deed against parties who, being ignorant of such acts, have loaned money upon the security thus acknowledged, but which is regular and fair on its face.

**ACTION of right.** The facts are stated in the opinion.

*Curtis Bates*, for the appellant.

*M. D. McHenry, pro se.*

By Court, **LOWE, J.** The facts out of which this controversy arises are these: The defendant Day, about the twenty-seventh day of January, 1857, borrowed the sum of two thousand five hundred dollars from Messick and Robertson, of Kentucky, through their agent, William H. McHenry, of Des Moines, Iowa, to secure which the said Day and wife executed and delivered a deed of trust (naming William H. McHenry, the trustee therein) upon the following described property: The south half of lots 1 and 2, in block C, in the commissioners' addition to Fort Des Moines, Polk County, Iowa. Also lots Nos. 1, 2, 3, and 4, in block B; lots Nos. 1 and 2, in block C; lots Nos. 1, 2, 3, 4, 5, 6, 7, 9, and 10, in block D; and lots Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in block A, situated in D. P. W. Day's addition to Fort Des Moines.

Default being made in the payment of the money, the property conveyed in the deed of trust was sold by the trustee to the plaintiff as the highest bidder for the sum of \$601, who brings his action of right to recover possession of the two lots first-above described. The defense set up may be stated in substance as follows: That at the time of the execution of said deed of trust, the defendants were occupying said lots as their homestead, and continued to do so up to the sale of the same by the trustee, and the institution of this suit; that Alice E. Day, the wife of D. P. W. Day, had not acknowledged said deed of trust before any officer authorized to take the acknowledgment of deeds; that the notary public, before whom said acknowledgment purports to have been taken, never presented said deed of trust to her for that purpose; that when, as a matter of fact, she did sign the same, the notary was not present; that her husband presented the deed to her for her signature, representing at the time that it was for the lots on the hill in his own addition to the city of Fort Des Moines; that, relying upon this statement, she signed the deed without reading it; that she

would not have signed the deed had she been advised that her homestead was included in the same.

A demurrer was filed by plaintiff to the sufficiency of the matters set forth in this defense, and before a hearing was had upon the same, the whole cause was by order of the court referred to James M. Elwood, Esq. On the hearing before the referee, it was agreed that the whole case, without deciding the demurrer, should be heard upon the merits, and that either party should give in evidence, under the pleadings, proofs to establish his or their case to the same extent, and with the same effect, as though specially pleaded.

In the award of the referee is reported all the evidence taken before him, together with the facts which, in his judgment, the proofs establish, and his conclusion of law thereon. After finding that the legal title of the premises in controversy was in the plaintiff, in virtue of the deed obtained under the trustee's sale, he finds, also, that the evidence in the main sustains the new or special matters of defense set up in the answer, but nevertheless the referee held that these facts, if true, did not constitute a legal defense in this action; that the said Alice E. Day, in executing said deed of trust with her husband, is presumed to have been cognizant of the property which the same conveyed; but if, through her own mistake or negligence, she did not ascertain what property the deed in fact embraced, still, as between herself and the innocent parties who acted in good faith in the transaction, she cannot take advantage of such negligence, and make it the ground of relief against the consequences of her own signature; that as between herself and innocent parties, where no fraud is alleged, the said Alice stands in no better position than if she had executed said deed of trust voluntarily, and with a full knowledge of all the facts in the transaction: *Babcock v. Hoey*, 11 Iowa, 375; that between the trustee, beneficiaries, and their immediate grantees on the one hand, and the grantors on the other, it was not necessary that the deed of trust should have been acknowledged, in order to make it a binding or valid conveyance.

This last proposition, perhaps, is stated rather broadly by the referee, so far as Alice E. Day is concerned. It is not necessary, in the determination of this cause, or in affirming the general conclusion to which the referee and the court below came, to hold that a deed, unacknowledged by the wife, executed in conjunction with her husband, is valid against her, even in a direct proceeding between the parties to the same.



It has been the policy of the law, as well as of the courts, to hold a strict compliance with the solemnities of the law, in divesting a married woman of her interest in real estate. The certificate of acknowledgment to the deed of trust in this, is regular and in due form, and purports to have been made in good faith. It is true, the evidence shows the following irregularity in the acknowledgment of the deed: That the notary had certified to the acknowledgment of the same, without requiring the personal presence of the party, but upon a previous verbal authority given by her, accompanied, at the time, with her written signature, to the effect that the notary should do so when a deed was presented by her husband, with her signature affixed. This informality in the mode of taking the acknowledgment would be fatal, it may be, to the validity of the deed, under some circumstances, but certainly she cannot be permitted to take advantage of her own irregular and wrongful acts, against parties who, ignorant of all this, had loaned a large sum of money to her husband, upon the strength of a security perfectly regular and fair upon its face, both in form and substance: *Baldwin v. Snowden*, 11 Ohio St. 203.

Believing that the decision below was founded upon the law applicable to the facts in this case, and upon which further elaboration does not seem to be required at our hands, we accordingly affirm the same.

Affirmed.

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CONVEYANCE OR ALIENATION OF HOMESTEADS: See note to *Poole v. Gerard*, 65 Am. Dec. 482 et seq.; and see *Kurz v. Brusch*, ante, p. 435.

THE PRINCIPAL CASE IS CITED in *Simms v. Hervey*, 19 Iowa, 288, 298, and *Lake v. Gray*, 30 Id. 419, to the point that a deed is valid between the parties, though neither acknowledged nor recorded. In *Green v. Scranage*, 19 Id. 466, it is cited to the point that the wife cannot set up fraud of her husband, or his undue influence, if she wrongfully acknowledge that the deed was her own free act; and in *Edgell v. Hagens*, 53 Id. 226, to the same effect, the court holding that irregularities or invalidity must appear on the face of the instrument.

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## NORTH AND SCOTT v. MUDGE & Co.

[13 IOWA, 496.]

CONFESSION OF JUDGMENT BY ONE MEMBER OF PARTNERSHIP, for the firm, is valid only against the partner making it.

DEMAND OF INFERIOR DEGREE WHEN CHANGED INTO ONE OF HIGHER CHARACTER IS MERGED into the latter.

JUDGMENT AGAINST ONE PARTNER, ON DEMAND AGAINST FIRM, is a bar to another action against the firm upon the same demand.

**ACTION** on a promissory note. The opinion states the facts. *Clinton and Nourse*, for the appellants.

*Knapp and Caldwell*, for the appellees.

By Court, **LOWE, J.** On the eleventh day of October, 1852, the defendants, A. Mudge & Co., made and delivered their promissory note to the order of plaintiffs for the sum of \$836.50, payable six months after date. Prior to the twelfth day of August, 1854, credits to the amount of \$256.50 were entered upon said note. On the day last named, plaintiffs procured A. Mudge, one of the members of the firm of A. Mudge & Co., to confess a judgment of \$638.50 in vacation, against said firm, in favor of the plaintiffs, upon a sworn statement of facts of the transaction out of which the indebtedness arose. This confession of said judgment was duly entered of record by the clerk of the court, and subsequently approved by the district court.

In March, 1859, the plaintiffs commenced this suit on the same note against the defendants. They plead, in bar to a second recovery on said note, the foregoing judgment; that it was confessed on the same note, and on no other cause of action; that said judgment is still in full force and effect, unreversed or uncanceled.

The plaintiffs reply that said judgment is void; that A. Mudge had no authority to confess it; that said confession purports to be upon an account and not upon the note; that it is materially defective, and under it the clerk had no authority to enter judgment against defendant, etc.

The cause was tried by the court; on hearing, the plaintiffs introduced in evidence the note sued upon, and rested. The defendants offered in evidence the confession of judgment above described, together with the oral testimony of A. Mudge, of the firm of A. Mudge & Co., who testified that at the request of one Driver, agent of the plaintiffs, he gave and executed the confession of judgment alluded to, that the confession was for the balance due on the identical note now sued upon, that said note had been originally given for the price of certain goods, wares, and merchandise, purchased by the firm of A. Mudge & Co., of the plaintiffs; that it was present at the time, and constituted the foundation of the confession.

S. W. Summers was also introduced by the defendants as a witness, who testified that the note sued on was for some time in his custody; that he subsequently gave the note up to one

Driver, the agent of the plaintiffs, who afterwards stated to him that a judgment had been confessed by A. Mudge & Co. on the same note, but expressed some dissatisfaction with said confession. This was the substance of the testimony offered by the defendants, which the court ruled out as inadmissible, holding that the said judgment by confession was void, and constituted no bar to plaintiffs' right to recover in this action.

The exclusion of this testimony was made the ground of exception, and appeal to this court. The correctness of this ruling is not apparent to us, nor are the reasons for it disclosed in the bill of exceptions.

The sworn statement of facts out of which the indebtedness arose, with the *cognovit* upon which the judgment was entered, seem to be substantially sufficient under the decision we made in the case of *Vanfleet v. Phillips*, 11 Iowa, 559.

That it is void as against the defendant Baldwin, we have held in the case of *Christy v. Sherman*, 10 Iowa, 535. In the same case we held, however, that the judgment was good and binding on the party or partner confessing the same. We will now refer to other authorities, not only to show that such judgment is not void against the party confessing, but that the contract debt upon which such confession was made is merged in the judgment, so that it cannot become the subject of another cause of action.

The general doctrine is, that if a demand of an inferior degree is changed into one of a higher character, the former is merged in the latter, upon which the party must alone rely. Thus the merger of a simple contract debt in a judgment, or debt of record, is made a familiar example in the books. We will refer to a few of the many adjudicated cases to show the incorrectness of the ruling below in this case.

In *Sloo v. Lea*, 18 Ohio, 279, it was held that a judgment against one of two partners upon a joint promise is a bar to a subsequent suit against both of the partners.

In *Robertson v. Smith*, 18 Johns. 459 [9 Am. Dec. 227], a firm, consisting of four persons, made two notes in their partnership name. A judgment was recovered on the notes against the two ostensible partners. The judgment not being paid, a second suit was brought on the notes against the four partners, one of whom only being served with process, and who was not in the first, pleaded in bar the recovery against the two, and it was sustained.

In *Smith v. Black*, 9 Serg. & R. 142 [11 Am. Dec. 686], a

judgment recovered against one partner is a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. A similar decision was made in *Moale v. Hollins*, 11 Gill & J. 11 [33 Am. Dec. 684].

In *Wann v. McNulty*, 2 Gilm. 355 [43 Am. Dec. 58], it was held that a judgment against one member of a firm for a debt due from the firm constitutes a bar to a recovery against the other members. The same general principle or rule of practice is laid down in the following cases: *Robertson v. Smith*, 18 Johns. 459 [9 Am. Dec. 227]; *Ward v. Johnson*, 13 Mass. 148; *Thompson v. Emmert*, 15 Ill. 416; *Taylor v. Claypool*, 5 Blackf. 557; *King v. Hoare*, 13 Mees. & W. 494; *Trafton v. United States*, 3 Story C. C. 646.

We have but little hesitation in concluding that the court below erred in ruling out the defendants' evidence, and the judgment will therefore be reversed, and the cause remanded.

Reversed.

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JUDGMENTS AGAINST PARTNERSHIPS, AND MEMBERS THEREOF, EFFECT OF: See note to *Wood v. Watkinson*, 44 Am. Dec. 570 et seq. Judgment against one partner on a demand against a firm is a bar to another action against the firm on the same demand: *Wann v. McNulty*, 43 Id. 58, and see the principal case cited to this effect in *Sherman v. Christy*, 17 Iowa, 323, 325, distinguishing, however, that case from the principal case.

NOTE SUED ON BECOMES MERGED IN JUDGMENT: *Hartford, Thayer, & Co. v. Street*, 46 Iowa, 595, citing the principal case.

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## LARSON v. REYNOLDS AND PACKARD.

[13 IOWA, 579.]

CONVEYANCE OF HOMESTEAD BY HUSBAND WITHOUT CONCURRENCE OF WIFE is void.

WIFE IS NOT NECESSARY PARTY TO PROCEEDINGS RELATING TO HOMESTEAD, but she will not, when not made a party, be estopped by a decree foreclosing a mortgage thereof executed by the husband alone, nor will she be ousted from the possession by a sale made under such a decree.

MORTGAGE OF HOMESTEAD PROPERTY BY HUSBAND WITHOUT CONCURRENCE OF WIFE is invalid, notwithstanding his wife subsequently dies, and will not, if he marry again, preclude his second wife's right of homestead in such property, nor will she be concluded by a foreclosure decree by default, entered after such second marriage, in an action to which the second wife was not a party, though the decree will be conclusive as to husband.

**BILL** in equity. Complainant being seised in fee of certain land, occupying the same as a homestead with his wife and children, bought of one Dow certain other real estate, and to secure the purchase-money made a mortgage upon the property so purchased, together with other land, including the said homestead, which mortgage was signed by complainant but not by his wife. Packard, having purchased the mortgage of Dow, commenced his action to foreclose the same. A decree of foreclosure was entered by default, and on execution thereunder the mortgaged property was sold to Packard, who in turn sold a portion of it, including the homestead tract, to Reynolds. Reynolds commenced his action of right for the premises, and it was to restrain him from proceeding with this action that this bill was filed. An injunction being obtained herein was, on final hearing, made perpetual, and the sale by the sheriff and all title thereunder set aside, and from these orders respondent appealed. As part of the facts it should be stated that complainant's wife died after the making of the mortgage and before the institution of the foreclosure suit, and that he married again at some time prior to said foreclosure suit. The remaining facts appear in the opinion.

*Clark and Clark*, for the appellant.

*L. W. Griswold*, for the appellee.

By Court, **WRIGHT, J.** Various grounds are set out in the bill for setting aside the decree of foreclosure, the sheriff's sale, the deed from Packard to Reynolds, and protecting complainant in his homestead, and title to all the land sold by the sheriff; but it is manifest, and substantially admitted in the argument, that in the court below the decision turned upon a construction of the homestead statute, as applied to the actual facts and circumstances of the case. And this might well be so, for as against Reynolds, neither defects in the petition for foreclosure, variance between the notice and petition, the supposed blending therein of law and equity jurisdiction, the fact that the decree was drawn up by petitioner's attorney, that it was not signed by the judge, that the sheriff's deed to Packard was insufficient in its recitals, that the premises were sold for \$362, when worth from \$1,200 to \$2,000, nor all of them combined, would be sufficient to defeat his title. The cardinal question is (and it is to reach this point that the petition is for the most part drawn), whether the sale of the homestead

is void, or whether, under the circumstances disclosed, Reynolds acquired any title thereto, as against the mortgagor.

The statute expressly enacts that a conveyance of the homestead is of no validity, unless the husband and wife concur in and sign the same: Code, 1247; Revision, 2279. And that a conveyance by mortgage signed by the husband alone, under such a statute, is invalid, see the following cases: *Alley v. Bay*, 9 Iowa, 509; *Yost v. Devault*, Id. 60 [66 Am. Dec. 92]; *Williams v. Swetland*, 10 Id. 51; *Dorsey v. McFarland*, 7 Cal. 842; *Richards v. Chace*, 2 Gray, 383; *Williams v. Starr*, 5 Wis. 534.

But these questions remain: What effect does the subsequent death of the wife have? How far is complainant concluded by the foreclosure proceedings? Does his subsequent marriage before the foreclosure affect the question?

If complainant's present wife had been made a party to the bill to foreclose, we think the controversy would have been at an end. A failure to set up the homestead exemption at that time would have concluded and estopped them from making the claim against one holding under the sale. The order of foreclosure would have settled the homestead right, and in an action for the possession it could not be again adjudicated. This seems to us to be in accordance with familiar and well-settled law, as applied to analogous questions, and is sustained by the following direct adjudications: *Lee v. Kingsbury*, 13 Tex. 68 [62 Am. Dec. 546]; *Tadlock v. Eccles*, 20 Id. 782 [73 Am. Dec. 213]. Where there is personal service, and a party from his own fault fails to make his defense, he is as much concluded as if the question had been expressly determined.

And so, again, if complainant had not been married at the time of the foreclosure, he could not now raise the question. For if unmarried he was the only person who could defend, or insist upon the homestead right. And though the mortgage was invalid for want of the wife's signature, yet he might, or not, insist upon such invalidity. It is as if he had been sued upon a note declared void by statute, or one that he had fully paid, or one obtained by fraud, and had failed after personal service, to make his defense. In such a case, the judgment concludes him of course, and we see no reason why the same rule does not apply in the present instance.

The mortgage being invalid at the time of its execution, the subsequent death of the wife would not change its character. If her right therein had been a mere dower interest, the deed

without her signature would have been good to the extent of his right, and her death would have put an end to any claim of dower. But the right of the wife to the homestead differs from that of dower, and the provisions of the statute as to its conveyance or encumbrance are also different. It is not different from dower in such a sense that a similar deed will not convey the one as well as the other. But the difference arises necessarily from the rights and privileges reserved to the wife during and after the life of the husband. Thus the husband may fail to select, plat, mark out, and record the homestead, and if so, the privilege then devolves upon the wife. So as we have already seen, the deed passes nothing, not even his interest, if she does not join. Upon his death she has a right to continue in its occupation, and it cannot be taken from her by his will or devise. And if she does not survive the husband, her issue may, upon a certain contingency, take the whole homestead. From which premises it is reasonably clear that the wife's right or interest in the homestead is not merely an inchoate one, to become vested after his death, and after assignment that may be disposed of by a judicial sale for the debt of the husband; but that the occupation of it as a home gives her a right therein, without any further act on her part, or any one for her, which cannot, without her consent, be divested. The homestead belongs, as it were, to the family. It is for the benefit of the family,—parents and children. As to its conveyance, the law contemplates that there shall be a concurrence of both minds (of the two heads, so to speak) before the dwelling-place of the family shall be encumbered, or the right of either one be divested or affected. It is seen, therefore, that the will of the wife is, in theory, as supreme as that of the husband. And in perfect consonance with these views is the case of *Revalk v. Kraemer*, 8 Cal. 66 [68 Am. Dec. 304]; and *Van Reynegan v. Revalk*, Id. 76, where it was held that a mortgage upon a homestead, which was void because executed by the husband alone, is not rendered valid by the subsequent death of the wife. In such a case, the debt remains good, and the property, if liable, becomes so just as if the mortgage never existed. The case of *Lies v. De Diablar*, 12 Id. 327, recognizes somewhat the same principle, for it is there held that the exemption is as much for the benefit of the children as the wife, and therefore where, after the elopement and adultery of the wife, the husband mortgaged the homestead, the mortgage was held inoperative and void.



The mortgage was invalid, then, when made. If complainant had not been married at the time of the foreclosure, or if the present wife had been made a defendant in that action, the homestead exemption could not now be set up. It then remains to inquire, What effect shall his subsequent marriage and the non-joinder of the wife have upon respondent's title?

The necessity of making the wife a party, or allowing her to intervene in an action affecting the homestead, is not very clearly settled by the authorities. In California and Texas (in which states, by the way, more important questions touching the homestead right have been settled than in any others), it is held that husband and wife should be joined; that if, on foreclosure, she is not joined, her rights are not affected, and that it is error to refuse to allow her to intervene: *Sargent v. Wilson*, 5 Cal. 504; *Tadlock v. Eccles*, 20 Tex. 782 [73 Am. Dec. 213]; *Revalk v. Kraemer*, 8 Cal. 66 [68 Am. Dec. 304]; *Cook v. Klink*, Id. 347; and see *Wisner v. Farnham*, 2 Mich. 472. The cases in 8 California hold that if the husband alone is made a party and defends, his rights are not concluded by the decree; and he may, notwithstanding, join with his wife in a bill to restrain the carrying of the decree into effect.

In our own state, the question has undergone some discussion. *Sloan v. Coolbaugh*, 10 Iowa, 31, was a bill in equity by the husband to restrain a sale under a mortgage with power of sale (the mortgage being signed by the husband and wife), and it was there held that the wife was not a necessary party. In *Helfenstein v. Cave*, 3 Id. 287, the plaintiffs brought ejectment, and the husband set up the homestead claim. During the progress of the cause the wife asked to be made a party, and set up a claim to the homestead as existing in herself as a wife, independently of what her husband had done or omitted to do. The question arose under the act of 1849, chapter 124, and it was held that she should not have been allowed to intervene. In discussing the point, Woodward, J., uses this language: "If she has rights which she may assert separately from her husband, they cannot be such, at the best, as to exonerate her from doing that which her husband was to do,—that which the law required. She must at least show that she has done that which her husband was required but omitted to do. She must take the ground that what he has omitted she has done; or that as he refuses or neglects to make defense, she should be permitted to do so. Something

like this must be her position. . There is no new, different, or independent basis of right or law for her to found her claim upon. The statute is very meagre and deficient upon the matters above alluded to, it must be admitted; but there is room to doubt whether it intended to confer upon the wife the right here claimed, which is an independent right. The utmost that could, in any view of it, be accorded to her, would be to defend if he did not; or possibly, to show that she had supplied his omission by doing some act which he had neglected. But if she cannot assume one or the other of these grounds, there does not appear any reason for her becoming a party."

"We are not inclined," he continues, "to settle the question definitely as to her becoming a party under the above circumstances, since the cause does not demand it; but it seems apparent that without assuming some such positions as those above indicated, there is no call or occasion for letting her in. Of what benefit would it be? What would she gain, or what can she do? What is her position, as she asks admission now? The husband appears and defends, and she does not pretend the contrary. She does not claim that he has refused or neglected to do some necessary act, which she has supplied. She simply sets up a right to the homestead, as the wife of the defendant and as the mother of a family, without reference to what her husband has done or omitted to do. This claim of right we cannot recognize, and therefore, it is our opinion that the court erred in permitting her to come in as a party defendant."

Following what we believe to be the spirit of our statute, and especially after the construction given to it by these cases, we are inclined to the opinion, and so hold, that the wife is not a necessary party to every action which may affect the homestead. If she is a party to the mortgage foreclosed, then, of course, if not a party to the foreclosure, she would not be concluded by anything done. In that case, however, it would by no means follow that the husband, if a party, would not be estopped, though the wife might not be. The cases in California (8 Cal. 66; Id. 347) go much beyond what we regard the correct rule under our statute, in holding that if the husband alone is made a party, and defends, his rights are not concluded. He might, it is true, join with the wife in a bill to restrain proceedings under such a decree, but this, as it seems

to us, upon the ground of protecting her rights, and not because there was any right of his left for adjudication. In other words, as he could, if sued alone, set up the exemption, he could not, after decree upon that question, still insist for himself upon the same claim.

But assuming that she is not a necessary party, and that there has been a foreclosure of a mortgage which she did not sign, does it follow that the decree to which she is not a party estops either or both of them from claiming the exemption? Or take the very facts of this case: when the complainant married, in 1857, there was no valid encumbrance upon his homestead. His present wife, therefore, acquired the same right and interest therein as though the mortgage under which respondent claims had not been made. The invalidity was such as to effect it in the hands of any third person. And therefore while she is not a necessary party in all cases affecting the homestead (as in *Sloan v. Coolbaugh*, 10 Iowa, 31, or in ejectment, under ordinary circumstances, brought by or against the husband), yet in this instance, before she could be concluded and ejected from the possession of the homestead, which was never validly encumbered, she should have been made a party, and while the decree would be good as against the husband, it would not as to her. Not being good as to her, and as her right to the possession of the homestead cannot be disturbed by the sole action of the husband (we speak here of the general rule, and not of the exceptions contemplated by section 1249, and other parts of the code), ejectment would not lie to dispossess herself and family, as well as the husband, for their possession is the same, and if one cannot be dispossessed, neither can the other, according to the theory and policy of our law.

Under the testimony, it is impossible to ascertain how much was bid for the homestead, and how much for the other mortgaged property. The sale should therefore be set aside, and a new one ordered; so much of the decree, however, as sets aside the entire order of foreclosure is reversed. It is good as against the husband as to the amount found to be due, and also so far as it forecloses his interest in the mortgaged premises. The cause will be reversed and remanded, with instructions to proceed in a manner not inconsistent with this opinion.

Reversed.

**CONVEYANCE OR ALIENATION OF HOMESTEADS:** See *Poole v. Gerrard*, 65 Am. Dec. 482, note; and see *Kurz v. Brusck*, ante, p. 435; and *McHenry v. Day*, ante, p. 438, and notes. See the principal case cited generally as an authority on this subject in *Edwards v. Sullivan*, 20 Iowa, 504. In *Burnap v. Cook*, 16 Iowa, 153, *Morris v. Sargent*, 18 Id. 100, and *Barnett v. Mendenhall*, 42 Id. 298, the principal case is cited to the point that in Iowa the conveyance of a homestead is of no validity unless the husband and wife concur in and sign the instrument.

**WIFE IS NOT NECESSARY PARTY TO SCIT CONCERNING HOMESTEAD**, but unless she be joined, the judgment would not conclude her, however it might affect her husband: *Burnap v. Cook*, 16 Iowa, 153; *Chase v. Abbott*, 20 Id. 160; *Olson v. Bullard*, 40 Id. 14, all citing the principal case.

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## THORN v. THORN.

[14 IOWA, 49.]

**JOINT TENANT OR TENANT IN COMMON MAY CLAIM HOMESTEAD PRIVILEGE** against his co-tenants in the undivided premises.

**HOMESTEAD NOT WITHIN TOWN PLAT MUST NOT EMBRACE MORE THAN FORTY ACRES;** still, if when thus limited its value is less than five hundred dollars, it may be enlarged till its value reaches that amount.

**ACTION** of right to recover the undivided one fourth of certain lands. The action is based upon the following agreed statement of facts: The plaintiff has the legal title to all of the lands except what the defendant claims as a homestead. The plaintiff purchased the same at sheriff's sale, on execution against the defendant; and at that time the defendant had one undivided fourth interest in all the lands. Prior to this, defendant had held the legal title to all the land, and while he was so holding and was in possession thereof by himself and family, the plaintiff instituted a proceeding in chancery against him, in which it was decreed that the defendant held the title to one undivided fourth of the lands, and the plaintiff the title to the undivided residue. During all this time, the defendant was the head of a family, and occupied, and still continues to occupy, the land in question claimed by him as his homestead, and his interest therein is still an undivided fourth interest. On these facts the defendant claimed a homestead of sixty acres, including his house, as the value thereof did not exceed five hundred dollars. It was also agreed by the parties that the controversy involved but two questions, which are contained in the opinion. Upon the facts stated, the court allowed the defendant his homestead of sixty acres, as claimed, and the plaintiff appealed.

*Grant and Smith*, for the appellant.

*Spicer and Pratt*, for the appellee.

By Court, LOWE, J. It will be noticed that by the agreement of the parties, the court below was limited in its decision upon the facts stated, first, to the abstract question whether the defendant was entitled to claim exempt from execution sale a homestead in an undivided tract of land, in which other parties have an undivided interest, as tenants in common; if so, then, secondly, whether the defendant can claim more than forty acres as a homestead.

This last proposition is very clearly settled in the affirmative by section 2284, Revision of 1860, to the effect that if the homestead is not within a town plat, it must not embrace in aggregate more than forty acres; nevertheless, if, when thus limited, its value is less than five hundred dollars, it may be enlarged till its value reaches that amount.

In regard to the first proposition, it does not necessarily include the question whether a tenant in common can set up the defense of a homestead in an action of right, without an appeal to the chancery side of the docket, to have the same recognized and set apart as in cases of partition. Neither the agreement of the parties nor the pleadings raised the question as to the proper method or proceeding of having a homestead of a joint tenant set apart or protected. It is true, the plaintiffs, by their demurrer to defendant's plea, did raise such a question, but waived it by replication and subsequent stipulation making and agreeing upon a particular issue upon which they went to trial. In this condition of the record, it is not competent for the appellant to present to this court for the first time questions which were not passed upon or brought to the consideration of the court below.

We proceed, therefore, to consider briefly the question whether a joint tenant can claim under the statute of this state the homestead privilege against his co-tenants. Why not? The first section of the homestead law exempts from judicial sale the homestead of every head of a family, when there is no special declaration of the statute to the contrary. The only exceptions or declarations to the contrary are to be found in sections 2280, 2281. Joint tenancy is not one of these. How this homestead privilege is to be secured to the party claiming it, as a tenant in common with others, is altogether a different question, but not before us for determination.

The undivided one fourth of the lands in question was about ninety acres. The amount claimed by defendant as a homestead was so much less than this, and located in such a form as not to affect materially the value and form of the remaining lands, that we suppose the plaintiffs were content with the division as made and claimed by defendant, provided he was entitled to a homestead at all under the circumstances, and hence the submission of the question in the particular form specified.

The appellant, however, to sustain his position that a homestead cannot be taken out of and identified upon land held in common, cites *Wolf v. Fleischacker*, 5 Cal. 244 [63 Am. Dec. 121], which holds this language: "The statute did not contemplate that homesteads should be carved out of land held in joint tenancy, or tenancy in common, since it has provided no mode for their separation and ascertainment." A similar ruling was made in *Reynolds v. Pixley*, 6 Cal. 165.

But can such a reason be rendered in view of the provisions of our statutes?

Suppose the defendant, before his undivided interest was attempted to be extinguished by levy and sale, had filed a petition, setting forth in connection therewith his homestead right, and asking that in the petition it should be respected and secured to him, could it not have been done without diminishing or interfering with the just rights of his co-tenants? If the land should be found divisible without prejudice to the parties, it is competent for the referees to allot the shares to their respective owners, without having the same drawn, etc. Section 3617 of the Revision of 1860 declares that for good and sufficient reasons offered to the court, the referees may be directed to allot particular portions of the land to particular individuals. Under the discretion and power given to the referees by this section through the court, we do not see why the homestead may not be awarded to the proper owner or tenant without the slightest detriment to his co-tenants. Independently of any homestead right, it has been held by some courts that where one of the joint tenants had made valuable improvements, that on partition subsequently made he would be entitled to that part on which improvements had been made, or to compensation: *Robinson v. McDonald*, 11 Tex. 385 [62 Am. Dec. 480].

Such a ruling is founded in obvious justice and reason. The homestead right is derived alone from the statute, but cannot

be claimed and enforced by one tenant in common to the detriment of his co-tenants. Hence if he should happen to have erected and occupied a homestead on a piece of land which could not be partitioned without great prejudice to his co-tenants, it would have to be sold; but in that event the court would see that the value of the homestead and improvements, distinct from the land, would be secured to the party at whose expense and labor they had been made. From this last suggestion it will readily be perceived that the manner of recognizing and setting apart a homestead as it was done in the case at bar is liable to very great abuse, sometimes wholly impracticable, and often would result prejudicially to the rights of the other co-tenants. And in affirming this case we do not mean to sanction it as a precedent to be followed. On the other hand, we think it ought not to be followed or adopted as a rule. When two or more persons hold undivided interests in land, their interests can be separated only in one of two ways, either by an amicable partition in releasing to each other, or by statutory proceeding in partition. If they adopt this latter course, it cannot be united with any other action: Sec. 4178, Revision of 1860. Nevertheless such an action of right, if a joint tenant desires to set up a homestead by way of defense, we know no reason why he should not ask the court to suspend the proceeding in that case until the parties shall interplead as in partition cases, and have his homestead duly ascertained and allotted to him in the manner above suggested, if practicable. When this is done, he will be in a condition to make his homestead defense available in the action of right. If it should turn out that no partition could be made without great prejudice to the parties interested, then his defense to the action of law would fall to the ground, and he would be compelled to accept in money such compensation for his homestead as the court and referees might, under all the circumstances, award to him.

Although the proceedings in this case were irregular, we do not interfere with them; we are not required by the record to settle any question of procedure, but simply a principle or right, and this we determine, as the court below did, in favor of the defendant, and therefore the judgment is affirmed.

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URBAN AND RURAL HOMESTEADS: See *Pryor v. Stone*, 70 Am. Dec. 341, and note 353.

UNDIVIDED INTERESTS IN LANDS, WHETHER HOMESTEAD RIGHTS CAN ATTACH TO: This subject is treated in the note to *Wolf v. Fleischacker*, 63 Am.



Dec. 122-125; see also Freeman on Co-tenancy and Partition, sec. 54; note to *Pryor v. Stone*, 70 Am. Dec. 344. The principal case is cited to the point that tenancy in common does not defeat a homestead claim: *Hewitt v. Rankin*, 41 Iowa, 44; *Sentell v. Armor*, 35 Ark. 52; *Bartholomew v. West*, 8 Nat. Bank. Reg. 14; S. C., 2 Dill. 293.

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## TEMPLIN v. IOWA CITY.

[14 IOWA, 59.]

**MUNICIPAL CORPORATION IS LIABLE FOR CARELESSNESS OR NEGLIGENCE OF ITS AGENTS** in the construction of public works, on the same principle that a natural person is liable for damages resulting from his carelessness, unskillfulness, or wrong-doing.

**NEW TRIAL WILL NOT BE GRANTED ON GROUND THAT VERDICT IS AGAINST EVIDENCE**, where the evidence is conflicting.

**ACTION for damages.** The opinion states the case.

*Clark and Brother, and Fairall and Boal*, for the appellant.

*L. B. Patterson, and Edmunds and Ransom*, for the appellee.

By Court, BALDWIN, C. J. This is an action against Iowa City to recover damages which plaintiff claims to have sustained in consequence of the action of the authorities of said city in grading certain streets adjoining the property owned and resided upon by the plaintiff, thereby causing the water to flow in upon the lot, and into the cellar of the building thereon. Upon issue joined and trial by jury, a judgment was rendered in favor of the defendant, and the plaintiff appeals.

The only assignment of error is that the court erred in refusing to set aside the verdict of the jury, and grant to the plaintiff a new trial. Under this assignment it is claimed: 1. That the verdict is against the evidence; 2. That the verdict is against the instructions of the court; 3. That the instructions given by the court on its own motion are erroneous.

It is not assigned as error, though it is insisted upon in the argument of appellant, that the court erred in refusing to give the instructions asked by the plaintiff. The instructions given by the court upon its own motion dispose of the questions presented in those asked by the plaintiff. The instructions thus given are full, and cover all the questions that arise in the case. The court in its charge to the jury recognized the rule of law as adopted by this court in the case of *Cotes v. City of Davenport*, 9 Iowa, 227, "that a municipal corpora-

tion is liable for the carelessness or neglect of its agents in the construction of public works, on the same principle that a natural person is liable for damages resulting from his carelessness, unskillfulness, or wrong-doing." The instructions of the court were fully as favorable to the plaintiff as the law would justify the court in making them, and they were not even excepted to at the time they were given. The point most relied upon by the appellant is, that the verdict is against the weight of evidence. A great number of witnesses were called, and their testimony is before us. Their evidence as to the injuries the plaintiff has sustained is very conflicting, so much so that it was peculiarly the province of a jury to determine in whose favor there was a preponderance. After a careful consideration of the evidence, we do not think that this falls within the class of cases that would justify us in interfering with the discretion of the district court, more especially in this case, as the jury could better determine the applicability of the evidence to the case, as they were, under an order of the court, directed to view the premises.

Affirmed.

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**VERDICT WHEN SET ASIDE AND NEW TRIAL GRANTED BECAUSE AGAINST EVIDENCE:** See *Kidd v. Laird*, 76 Am. Dec. 472, note 479; *Cooper v. Mullins*, Id. 638. The principal case is cited to the point that where evidence is conflicting, a very clear case must be made out to justify the court in setting aside the verdict on the ground that it is not supported by the evidence: *Conner v. Mountain*, 28 Iowa, 593; also to the point that a verdict may be set aside when rendered under direction of the court, because no replication had been filed where it is shown that a replication had been prepared and handed to the clerk for filing: *Barnes v. McDaniels*, 35 Id. 382.

**LIABILITY OF CITY FOR NEGLIGENCE OF ITS AGENTS IN CONSTRUCTION OF PUBLIC WORKS:** *City of St. Paul v. Seitz*, 74 Am. Dec. 753, and note 761, 762. The principal case is cited to the point that cities and towns are liable for negligent and careless construction of improvements and repairs of streets: *McCord v. High*, 24 Iowa, 346; *Ross v. Clinton*, 46 Id. 611; *Weis v. City of Madison*, 75 Ind. 248.

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## PLUMMER v. DOUGLAS AND WATSON.

[14 IOWA, 69.]

**DEPENDANT IS ESTOPPED FROM DENYING VALIDITY OF JUDGMENT BY CONFESSION** where in the statement therefor he admits that a sum certain is due plaintiff, and consents to the rendition of judgment for that sum, notwithstanding the statement is so defective in setting out the facts out of which the indebtedness arose that the judgment is invalid as to creditors other than the judgment creditor.

BILL for injunction restraining defendants from taking further action for purpose of collecting a judgment confessed by complainant in favor of the defendants, on the ground that the statement of the facts out of which the indebtedness arose was defective. Injunction made perpetual, and defendants appeal.

*C. H. Conklin*, for the appellants.

*I. M. Preston and Son*, for the appellee.

By Court, BALDWIN, C. J. It was held by this court in the case of *Bernard v. Douglas*, 10 Iowa, 370, that the statement of facts upon which this judgment was confessed was defective, and the judgment thereon void, at least as to the rights of other creditors. The question now presented is, whether it is void as against the complainant, who was the defendant in the judgment confessed.

Judgments by confession are closely scrutinized, and their validity more frequently questioned than any other kind of legal proceedings. The design of the statute authorizing such judgments is altogether proper, but those who desire to overreach their creditors, to cover their property by prior encumbrance, resort to this mode of creating liens more than to any other.

The validity or invalidity of such judgments as against the rights of third parties, where the statute has not been strictly complied with, has been frequently brought to the attention of this court, and the law controlling the rights of such parties fully settled.

The question as to the validity of such judgments between the parties, when the statute has not been substantially complied with in respect to the statements of facts out of which the indebtedness arose, is in this case fairly presented.

In the case of *Edgar v. Greer*, 7 Iowa, 136, the statement of facts out of which the indebtedness arose was held to be defective, and the judgment entered thereon was reversed. The court do not undertake to say that the judgment was void. It is in substance held that where there is a substantial error in the manner of the confession the defendant can appeal, that by his confession he is not estopped from gainsaying the correctness of the judgment, or asking of this court its reversal.

In *Kennedy v. Lowe*, 9 Iowa, 580, it was held that where the statement of facts was not such as was contemplated by the provisions of the statute, the judgment confessed thereon

was void as to the creditors of defendant, and the right of the defendant to take advantage of such defect upon appeal is, as in *Edgar v. Greer*, 7 Iowa, 136, clearly recognized. In neither of these cases is it assumed by the courts that the judgment is void.

In the case of *Bernard v. Douglas*, 10 Iowa, 370, the statement of facts was held to be insufficient to authorize such a judgment as would prejudice the rights of third parties. The validity of the judgment as against the party making the confession was not before us. Bernard & Co., as creditors of the defendant, moved to set the judgment aside, claiming that, as against them, the judgment was fraudulent and void, for the reason that they were not advised of the nature of the indebtedness upon which the confession was made.

While the language of the opinion would seem to indicate that a confession of judgment made upon a defective statement of facts was without authority of law and void, yet it will be remembered that the validity of the judgment as against the party making the same, and the rights of the plaintiff in the confession as against the defendant, was not before the court for consideration. The judgment was declared void only so far as third parties were concerned.

In the case of *Vanfleet v. Phillips*, 11 Iowa, 558, this court held that the statement of facts upon which each of the several judgments was confessed was sufficient. In the opinion, my associate, Judge Wright, appears to entertain grave doubts as to the correctness of the decision in *Edgar v. Greer*, 7 Iowa, 136, and *Kennedy v. Lowe*, 9 Id. 580, in so far as they assume to treat such judgments as entirely void, and follows with a remark which clearly indicates his opinion as to validity of such judgments between the parties thereto.

As above stated, we do not think that the court, in the case of *Edgar v. Greer*, 7 Iowa, 136, or *Kennedy v. Lowe*, 9 Id. 580, decided that the judgments in those cases were entirely void. What the effect of such judgments would have been, as between the parties, had they not been appealed from, was not passed upon.

In the case of *Churchill v. Lyon*, 13 Iowa, 431, the statement was held to be insufficient under the statute; yet this court held that the judgment thereon was valid, and effective as against Lyon, for the reason that the confession was made in open court, and not in vacation.

The question as to whether judgments thus entered, where

the statements are defective, are void as between the parties, seems to be unsettled by this court.

The provision requiring the party confessing to show in his statement the facts out of which the indebtedness arose was calculated to guard against judgments by collusion between the parties, but it was never designed that the defendant should take advantage of his own omission or intended wrong. As between the parties where the defendant swears that a certain sum is due, and he consents to the rendition of a judgment for that amount, the necessity for such a statement ceases to exist.

We are also of the opinion that the defendant, after having sworn to a sum certain as due to the plaintiff, and consenting to the rendition of a judgment for such sum, is estopped from denying the validity of a judgment which by his own acts he has induced the plaintiff to obtain.

Cowen, J., says, in the case of *Dezell v. Odell*, 3 Hill (N. Y.), 219 [38 Am. Dec. 628]: "We have, then, a clear case of an admission by the defendant intended to influence the conduct of a man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interest, unless the defendant be cut off from the power of retraction."

"As a general rule, a party will be concluded from denying his own acts and admissions which were expressly designed to influence the conduct of another, and did so influence it. And where such denial will operate to the injury of the latter," see opinion of Nelson, C. J., in *Welland Canal Company v. Hathaway*, 8 Wend. 483 [24 Am. Dec. 51].

Reversed.

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STATEMENT OF FACTS, WHEN SUFFICIENT TO SUPPORT JUDGMENT BY CONFESSION: See *Nichols v. Kribs*, 76 Am. Dec. 294, and note 296; *Bryan v. Miller*, 75 Id. 107, and note 109. But such judgment is binding upon the parties thereto, though the statement be defective: *Bryan v. Miller*, *supra*. The principal case is cited to the point that the party confessing judgment is estopped from denying the validity thereof where he admits that a certain sum is due, although the statement does not set forth the facts out of which the indebtedness arose: *Burchett v. Cassady*, 18 Iowa, 343; *Daniels v. O'Leary*, 15 Id. 153; *McMillan v. Craig*, 14 Id. 503; *Thorp v. Platt*, 24 Id. 316.

## CURTIS v. MILLARD &amp; Co.

[14 IOWA, 128.]

**LEGAL ESTATE OF JUDGMENT DEBTOR IS NOT DIVESTED BY SALE** of his land under execution until after the expiration of the time for redemption, and the title has vested in the purchaser by deed from the sheriff, and prior to that time such estate may be the subject of a lien, or of a sale under execution, or of a conveyance by deed from the debtor.

**JUDGMENT RENDERED AGAINST DEBTOR AFTER EXECUTION SALE OF HIS LAND**, and before the expiration of the redemption period, attaches as a lien upon debtor's interest therein, and a grantee of the debtor takes the premises subject to the same liens and encumbrances that existed upon them in the hands of the debtor.

**PURCHASER OF LANDS SOLD ON EXECUTION ACQUIRES ONLY LIEN UPON LANDS** for the amount of his bid, and interest during the redemption period.

**FAILURE OF SUBSEQUENT JUDGMENT CREDITOR TO REDEEM LAND OF DEBTOR** from sale under former judgment does not render his judgment lien inoperative against the debtor or his grantee, in the event either should redeem within the time allowed by law.

**BILL for injunction.** Gregory, Tilton, & Co., in July, 1859, obtained judgment of foreclosure against Downing and Foster for \$850, and the premises were sold under this judgment to Gregory, Tilton, & Co. for \$500. And afterwards, in February, 1860, the same premises were sold as the property of Downing and Foster, under a general execution to Gregory, Tilton, & Co., for \$465, to satisfy the balance due on the judgment. In July, 1860, the defendants Millard & Co. recovered a judgment against Downing and Foster for \$140. And in February, 1861, the plaintiff purchased from Downing and Foster the premises in controversy, including the right of redemption, and soon after redeemed the property from the sale to Gregory, Tilton, & Co. In January, 1861, execution was issued on the judgment of Millard & Co., and levied on the premises, which were advertised to be sold. And it was to restrain this sale that plaintiff filed his bill for an injunction. Answer was filed, and upon motion the injunction was dissolved and the suit dismissed. The plaintiff appealed.

*Wright and Avery, and Bagg and Allen, for the appellant.*

*Burke, for the appellees.*

By Court, **LOWE, J.** Two questions arise upon the facts as above stated: 1. Was the defendants' judgment a lien upon the real estate sold upon the execution in favor of Gregory, Tilton, & Co.? 2. If so, could the defendants enforce this lien

against the grantee of the execution debtor without first redeeming the property from the sale to the said Gregory, Tilton, & Co.?

The appellant holds to the negative of both questions. In regard to the first, he insists that after a sheriff's sale of a debtor's property, the debtor has nothing left in the property sold except the naked right of redemption, which is not an interest that can be seized and sold, nor upon which a subsequent judgment can operate as a lien. And then, again, if the defendants should be held to be lien creditors, they should have redeemed the property purchased by Gregory, Tilton, & Co., within nine months from the date of their purchase; and having failed to do so, they can now take nothing by their supposed lien, especially against the grantee of the judgment debtor.

Under our statute the legal estate of a judgment debtor is not divested by a sale of his land under execution, until after the expiration of the time for redemption, and the title has vested in the purchaser by deed from the sheriff. Prior to the delivery of such deed (which cannot be made until after the time for redemption runs out), the legal estate, the possession, and usufruct all remain with the execution debtor, and is an interest of value, or such an estate as may be the subject of a lien, or of a sale under an execution, or of a conveyance by deed from the debtor. If, during the interim between the date of the sale and the delivery of the sheriff's deed to the purchaser, other judgments are rendered against the debtor, it has been repeatedly held that they attach as liens upon the debtor's interest, which is one of real value, consisting, not only of the legal estate, rents, and profits, but the consequent right to discharge the lien and make his estate absolute. If, under such circumstances, the debtor should sell his right and interest in the premises, the purchaser would take it subject to all the liens and encumbrances that existed upon the same in the hands of the vendor. Now, the courts have frequently declared that the purchaser of lands sold on execution acquires by his purchase no more than a lien upon the lands for the amount of his bid, and interest during the time allowed for redemption. He acquires no right or estate upon which he could maintain ejectment, or which could be levied upon and sold for his debts; it is simply an inchoate or conditional right to an estate, liable to be defeated at any time within one year by the payment of the purchase-money and interest. In the case at bar, the plaintiff's purchase of Downing and Foster was no



less subject to the lien of Millard & Co. than that of Gregory, Tilton, & Co., for both liens rested alike upon the property at the date of his purchase. The failure of Millard & Co. to redeem from Gregory, Tilton, & Co. within nine months lost them that right, but it did not have the effect to render inoperative their lien against his debtors or their grantee, in the event either should redeem within the time allowed them by law. These principles are fully sustained by the following authorities, made under statutes not essentially different from ours, as it respects the questions involved in this case: *Vaughn v. Ely*, 4 Barb. 159; *Smith v. Colvin*, 17 Id. 157; *Van Rensselaer v. Sheriff of Onondaga County*, 1 Cow. 443-501; *Bissell v. Payn*, 20 Johns. 3; *McLagan v. Brown*, 11 Ill. 519; *Titus v. Lewis*, 3 Barb. 70; *Ex parte Peru Iron Co.*, 7 Cow. 540; *Evertson v. Sawyer*, 2 Wend. 507.

Affirmed.

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PURCHASER AT EXECUTION SALE IS NOT CLOTHED WITH LEGAL TITLE until he has received sheriff's deed, but has only a lien or equity: *Reynolds v. Harris*, 76 Am. Dec. 459; *McMillan v. Richards*, 70 Id. 655.

JUDGMENT AGAINST OWNER OF EQUITY OF REDEMPTION DOCKETED AFTER DECREE, but before sale, is a lien on the surplus proceeds, but is not such a lien if docketed after the sale: *Sweet v. Jacobs*, 31 Am. Dec. 252, note 256; see *McClung v. Beirne*, 34 Id. 739. But in *McMillan v. Richards*, 70 Id. 655, it is held that the mortgagor's estate after foreclosure sale and before conveyance to the purchaser is subject to the lien of a judgment against the mortgagor; and that the mortgagee who becomes a purchaser for less than his judgment has a lien upon the property prior to that of the redemptioner for the balance unpaid. See also the note to this case, Id. 675, 676; *Bradley v. Snyder*, 58 Id. 564. In some states, however, it is held that a judgment debtor's right to redeem property sold on execution cannot be sold under execution: *Merry v. Bostwick*, 54 Id. 434; *Watson v. Reissig*, 76 Id. 746, note 748. The principal case is cited to the point that if the debtor or his grantee redeem land which has been sold in part satisfaction of a subsisting judgment, the property at once becomes liable to satisfy the unpaid balance of the execution and other subsisting liens, from the moment of such redemption: *Crosby v. Elkader Lodge*, 16 Iowa, 405; *Stein v. Chambless*, 18 Id. 177; *Cauthorne v. Indianapolis etc. R. R. Co.*, 58 Ind. 16; but not so when the redemption is made by a lienholder: *Harp v. Thode*, 18 Iowa, 55.

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## DAVIS v. SIMMA.

[14 IOWA, 154.]

WINNESS INTERROGATED AS TO POSSESSION OF PROPERTY ALLEGED TO HAVE BEEN WRONGFULLY TAKEN, with a view to show *prima facie* ownership, may be asked on cross-examination whether he knew who owned the property; but the refusal of the court to allow the question is not ground for refusal, where the court offered to permit a recall of the witness by

the defendant, as the adoption of this course is a matter within the sound discretion of the court.

It is not ground for reversal that verdict was returned at half-past ten o'clock, P. M., and the judgment was not entered upon the docket until the next day at eleven o'clock, A. M., though the statute provides that the judgment on a verdict shall be entered upon the docket forthwith.

**ACTION** for damages. The opinion states the case.

*Henderson and Boardman*, for the appellant.

*T. Brown*, for the appellee.

By Court, WRIGHT, J. Plaintiff sued before a justice, claiming damages for the wrongful taking of his property, to wit, one steer, from his possession. The answer controverted all the allegations of the petition.

On the trial, a witness was introduced by plaintiff, who stated that his premises adjoined those of plaintiff; that the steer in question was taken from his premises by defendant. Plaintiff then asked if his cattle were on the lands of witness, averring that he wished to show possession and *prima facie* ownership. To this, witness answered that plaintiff's, as well as the cattle of other persons, were on his lands. On cross-examination, witness said he had frequently seen other cattle in his field. Defendant then asked witness if he knew who owned the steer so taken from his premises and identified by him. This was objected to as not being proper cross-examination. The objection was sustained, and defendant having prosecuted his writ of error to the district court, this ruling was there affirmed.

No good reason occurs to us why this inquiry was not proper. And yet we cannot say that the cause should therefore be reversed. The justice held that the witness could be recalled by defendant, or the same fact might be proved by other witnesses. In the exercise of a sound discretion, we think he might direct this course, and that defendant would have no right to complain. It is not in principle different from the case where the court, under particular circumstances, permits leading questions to be put to one's own witness,—or where this is prohibited to an adversary's witness who shows a strong interest in favor of the cross-examining party. In the same manner, it is assimilated to the inquiry whether, if a party is once entitled to a cross-examination, this right continues through all the subsequent stages of the cause, though the witness should be recalled by the opposite party. In such

cases, Mr. Greenleaf says that the general course of the examination is subject to the discretion of the judge, and that it is not easy to establish a rule which shall do more than guide, without imperatively controlling, that discretion: 1 Greenl. Ev. 447.

The verdict of the jury was returned to the justice on the 24th of January, 1862, at 10:30 o'clock, P. M. The judgment was not entered upon the docket until the next day at 11 o'clock, A. M. Defendant was present by attorney, and protested that the justice had no power to then enter the judgment. He now assigns the action of the district court, affirming this judgment, as error, relying upon section 3895 of the Revision of 1860, which provides that the judgment on the verdict of the jury shall be entered upon the docket forthwith. The justice returns that he was engaged, and could not sooner attend at his office.

To do a thing forthwith is to act immediately, without delay, directly. But it is always proper to look at the connection in arriving at the meaning of a word. In this case, the legislature has directed that the justice shall, without delay, or immediately, enter the verdict and judgment, because there is no occasion for deliberation on his part, whereas in most cases he is given three days after a cause is submitted to him for final action. But it is not intended that he should, at the very moment of receiving the verdict, enter the judgment. As was said in construing the same word in another statute, in *Lyon v. Comstock*, 9 Iowa, 306, "this is giving the language of the act a strict construction, which, we think, is hardly required. Some liberality is to be exercised." The justice is not allowed three days, nor is he required to work at unreasonable hours. The case of *Guthrie v. Humphrey*, 7 Iowa, 23, does not conflict in the least with this view.

Affirmed.

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CONSTRUCTION OF WORDS "IMMEDIATE" AND "FORTHWITH," in statutes concerning the entry of judgments: See *Sibley v. Howard*, 45 Am. Dec. 448, and note 449. The principal case is cited to the point that the word "forthwith," in the statute providing that a judgment on a verdict shall be entered on the docket forthwith, means within a reasonable time. "The justice may certainly stop to eat; and if, as in this case, it is late in the evening, he may stop to sleep; and he ought not to do official labor on the sabbath": *Per Cole, J., Burchett v. Casady*, 18 Iowa, 344.

PARTY HAS RIGHT TO CROSS-EXAMINE WITNESS FULLY AS TO ALL FACTS MATERIAL TO CASE, and regularly the cross-examination should follow the direct examination, but it may be postponed by the court, provided this does not prejudice the party who has the right to cross-examine: *Fralick v. Presley*, 65 Am. Dec. 413, note 418.

**BURTON v. KNAPP.**

[14 IOWA, 196.]

**WORDS SPOKEN OR DECLARATIONS MADE BY ATTACHMENT PLAINTIFF LONG AFTER ISSUANCE OF ATTACHMENT**, without evidence to show that such declarations related directly to the act of suing out the writ, are inadmissible in action on attachment bond as tending to prove malice in procuring the writ.

**INTRODUCTION BY DEFENDANT IN ACTION ON ATTACHMENT BOND OF EVIDENCE OF PLAINTIFF'S INSOLVENCY** at the time of the issuance of the attachment is no ground for complaint by the plaintiff, where the plaintiff first introduced evidence of his solvency, and the court afterwards ruled out all the testimony on the subject.

**PLAINTIFF IN ACTION FOR WRONGFULLY SUING OUT ATTACHMENT MUST SHOW** that the defendant had not good cause for believing the facts to be true upon which he based his affidavit for the writ; and it is not sufficient to show that, as a matter of fact, they were not true.

**ACTION** on two attachment bonds, given in two different attachment suits, wherein Knapp was plaintiff and Burton defendant. Judgment for the defendant, and appeal by the plaintiff. The opinion states the case.

*McNulty and Jennings, and O'Niel and Harvey*, for the appellant.

*Wilson, Utley, and Doud*, for the appellee.

By Court, BALDWIN, C. J. The first question presented by the counsel of appellant is, that the court erred in excluding certain derogatory and slanderous words spoken by the defendant Knapp, of the plaintiff, Burton, after the issuing of the attachments, which were offered by plaintiff as a circumstance tending to show the intentions of Knapp in suing out said attachments. The words which plaintiff proposed to prove the defendant had used were, that the said Burton was a rascal, scoundrel, and thief; that he was a forger, and that he (Knapp) could prove it. The court permitted the plaintiff to introduce in evidence the declaration of the defendant, made prior to the issuing of the writs of attachment, but excluded the above, because they were uttered long after the writs were issued.

Words spoken or declarations made by the defendant long after the attachments were issued, without any evidence tending to show that such declarations related directly to the act of suing out the said attachments, were certainly inadmissible. There is nothing in the evidence that tends to connect these declarations with the acts of the defendant in obtaining the

writs, and without such evidence we cannot see how such language tends to prove malice in procuring the writs. These expressions may have been superinduced by the conduct of the party after the attachments were issued, and may have referred to other and different transactions.

The second assignment of error presents virtually the same question, and needs no further consideration. By the third, it is claimed that the court erred in permitting the defendant to introduce evidence proving the insolvency of the plaintiff. In a note to this exception, signed by the judge, it is stated that "the court, after the most of the testimony as to the solvency of the said plaintiff was before the jury, ruled it out." It appears, also, from an amended bill of exceptions, that the question of plaintiff's solvency was first introduced by the plaintiff himself testifying as to the amount and value of his property when the attachments issued, and the amount of his liabilities. The defendant offered to show, after this, by evidence, documentary and otherwise, that the plaintiff was insolvent when the attachment issued. To this the plaintiff objected, and this objection was sustained. Taking the whole of these exceptions together, we think this cause of complaint is unfounded.

The fourth assignment relates to the first instruction given by the court to the jury. The part objected to reads as follows: "In this action the burden is on the plaintiff to prove a wrongful suing out of the writ, although this involves the proof of a negative. This he may do by showing that Knapp had no sufficient cause for believing that plaintiff had disposed of his property in part, or was about to dispose of it, to defraud his creditors, and without leaving sufficient for the payment of his debts, or for stating that plaintiff had refused to pay or secure said Knapp."

It is claimed by the counsel of appellant that this instruction holds the principle that if Knapp had sufficient grounds to believe that Burton had disposed of his property, or was about to dispose of it, to defraud his creditors, then the attachments were not wrongfully sued out. This is the understanding we have of the rule of law thus given by the court. The question, under our statute, is not whether the facts were actually true upon which the attaching plaintiff bases his affidavit for a writ, but had he, exercising that degree of caution that a reasonable, prudent man should, good cause to believe that which he had stated as true. This we regard as settled by this court in the case of *Winchester v. Cox*, 4 G

Greene, 121. And this decision is recognized as correct in *Mahnke v. Damon & Co.*, 3 Iowa, 107; and also (indirectly at least) in *Raver v. Webster*, Id. 502 [66 Am. Dec. 96].

It is claimed that this court has decided in the case of *Drummond v. Stewart*, 8 Iowa, 341, that the cause sworn to for an attachment must exist in fact. We do not understand this decision in this way. On the contrary, from the language in the sixth and last subdivision of the opinion, the writer, Justice Woodward, again recognizes the correctness of the ruling in the case of *Mahnke v. Damon & Co.*, 3 Iowa, 107. The other instructions given and refused become unimportant to consider, holding as we do upon this question.

Affirmed.

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**ACTIONS FOR WRONGFUL ATTACHMENTS AND DEFENSES THERE TO.** — In the examination of this subject, it is seen at once that it must be considered under two general heads: 1. As to actions on attachment bonds; and 2. As to actions for malicious attachments. While many of the rules in each are similar, and applicable to both classes of cases, the remedies are distinct, and cannot be considered in any respect as one and the same. It is uniformly decided that the remedy of the attachment debtor for a wrongful attachment by an action for malicious prosecution is not affected by the execution of the bond, but that that remedy still subsists: *Donnell v. Jones*, 48 Am. Dec. 59; *Kirksey v. Jones*, 7 Ala. 622; *McCullough v. Walton*, 11 Id. 492; *Sharpe v. Hunter*, 16 Id. 765; *Floyd v. Hamilton*, 32 Id. 235; *Pounds v. Hamner*, 57 Id. 342; *Sledge v. McLaren*, 29 Ga. 64; *Churchill v. Abraham*, 22 Ill. 455; *Lawrence v. Hagerman*, 56 Id. 68; *Spaids v. Barrett*, 57 Id. 289; *Pettit v. Mercer*, 8 B. Mon. 51; *Senecal v. Smith*, 9 Rob. 418; *Bruce v. Coleman*, 1 Handy, 515; *Sanders v. Hughes*, 2 Brev. 495; *Smith v. Story*, 4 Humph. 169; *Smith v. Eakin*, 2 Sneed, 456; *Preston v. Cooper*, 1 Dill. 589; and it seems as well settled that the bond is not intended as a mere security for the payment of what may be recovered in an action for malicious prosecution; for if so intended, it should be conditioned for the payment of damages which the defendant might sustain by reason of the attachment having been sued out maliciously, and without probable cause: *Drake on Attachment*, 6th ed., secs. 155, 166; *Pettit v. Mercer*, 8 B. Mon. 51; *Hayden v. Sample*, 10 Mo. 215; *Dunning v. Humphrey*, 24 Wend. 31; *Bruce v. Coleman*, 1 Handy, 515.

**ACTIONS ON ATTACHMENT BONDS.** — The statutory provisions found in most of the states, requiring the execution of a cautionary bond by an attachment plaintiff, is said to modify the common-law rule which allowed a recovery of damages for wrongful attachment only on proof of malice and want of probable cause; and to give the defendant recourse against the plaintiff on the bond for injuries from wrongful attachment, though no malice existed: *Pettit v. Mercer*, 8 B. Mon. 51; *Kirksey v. Jones*, 7 Ala. 622. In absence of other provision, the rules applicable to actions on the case for wrongful attachment will apply and govern the procedure in actions on attachment bonds: *Hill v. Rushing*, 4 Ala. 212; *Seay v. Greenwood*, 21 Iowa, 491; *Pixley v. Reed*, 26 Minn. 80.

**Accrual of and Right to Maintain Action.** — A right of action accrues to the obligee in an attachment bond, as soon as there is a breach of its conditions.

What would amount to a breach is dependent in each case on the wording of the bond, and it would require an examination of the entire subject of bonds in attachment, and of the provisions of the various statutes, to determine what would amount to a breach in every possible case.

It is generally held that a recovery of damages in a distinct action is not a prerequisite to an action on the bond: *Herdon v. Forney*, 4 Ala. 243; *Boatwright v. Stewart*, 37 Ark. 615; *Churchill v. Abraham*, 22 Ill. 455; *Bruce v. Coleman*, 1 Handy, 515; *Smith v. Eakin*, 2 Sneed, 456; *Dickinson v. McGraw*, 4 Rand. 158; though in some states, from the peculiar wording of the statutes or because of the form of the bond required, it has been held otherwise: *Sledge v. Lee*, 19 Ga. 411; *Sterling C. M. Co. v. Cock*, 2 Col. 24; *Sterling C. M. Co. v. Hughes*, 3 Id. 229; *Holcomb v. Foxworth*, 34 Miss. 265; *Rockafeller v. Hoyeradt*, 2 Hill, 616. Thus where the bond was conditioned to pay all costs and damages which might be recovered against the obligors, it was held that the amount must first be determined by judgment in a suit for that purpose: *Smith v. Eakin*, 2 Sneed, 456; *Sterling C. M. Co. v. Cock*, 2 Col. 24. And it is held that at all events the validity of the attachment must be determined in some manner before the defendant in attachment can sue on the bond: *Noile v. Thompson*, 3 Met. (Ky.) 121; *Sloan v. McCracken*, 7 Lea, 626; *State v. Beldsmeier*, 56 Mo. 226. In *Pixley v. Reed*, 26 Minn. 80, and *Noile v. Thompson*, *supra*, it is held that the vacation of a wrongful attachment, or that there was no opportunity to move therefor, must be shown in order to recover; but not where the attachment proceedings are *ex parte*: *Bliss v. Heasty*, 61 Ill. 338. A successful traverse of the single cause, or if more than one is assigned, of all the causes of attachment, and dissolution therefor, entitles the defendant to sue on the bond: *Harper v. Keys*, 43 Ind. 220; *Hoye v. Norton*, 22 Kan. 374; *Kerr v. Reece*, 27 Id. 469; and this before the final determination of the suit in which the attachment issued: *Kerr v. Reece*, *supra*. In these actions, it has been held that the truth of an affidavit, a plea in abatement to which has been sustained, cannot be inquired into: *Hayden v. Sample*, 10 Mo. 215. In Louisiana, it has been held that if an attachment be set aside for irregularity, that fact will be *prima facie* evidence that it was wrongfully obtained in an action on the bond: *Cox v. Robinson*, 2 Rob. (La.) 313. But it has been held otherwise, and with apparent good reason, in *Sharpe v. Hunter*, 16 Ala. 765; *Boatwright v. Stewart*, 37 Ark. 614; and *Eaton v. Bartscherer*, 5 Neb. 469; the court in the first case saying that it is not meant to include technical defects, irregularities, and omissions in the phrase "wrongfully suing out an attachment," and in *Garretson v. Zacharie*, 8 Mart., N. S., 481, it is held that where an attachment is dissolved for irregularities in procedure, the sureties on the bond are not liable for full damages.

A judgment for the defendant on the merits entitles the obligee in the bond to sue: *State v. Beldsmeier*, 56 Mo. 226; particularly where the judgment is the result of failure of the plaintiff to prove the existence of the debt which was the basis of the attachment: *Tucker v. Adams*, 52 Ala. 254; *Lockhart v. Woods*, 38 Id. 631; and though the truth of the affidavit was not put in issue: *State v. Beldsmeier*, 56 Mo. 226. It has, however, been intimated in *Sackett v. McCord*, 23 Ala. 851, that even a judgment on the merits against the plaintiff would not be conclusive evidence that the attachment was wrongfully sued out. In Indiana, it has been held, on the other hand, that a judgment for plaintiff would not be conclusive against defendant's right to recover on the bond: *Harper v. Keys*, 43 Ind. 220; especially where there was proof of malice and oppression in the attachment; but this ruling is a strained one,



and not adopted elsewhere. Thus in *Spengler v. Davy*, 15 Gratt. 381, it is held that no recovery can be had on the bond where both the attachment proceeding and main action have been sustained.

Where the plaintiff voluntarily abandons his attachment suit, it has been held, in some states, that he renders the obligors on the bond responsible in damages: *Cox v. Robinson*, 3 Rob. (La.) 313; *Penniman v. Richardson*, 3 La. 101; *State v. O'Neill*, 4 Mo. App. 221; while in others it is held differently: *Boatwright v. Stewart*, 37 Ark. 614; *Pettit v. Mercer*, 8 B. Mon. 51; *Cooper v. Hill*, 3 Bush, 219; *Nockles v. Eggspeler*, 47 Iowa, 400; the courts in the latter cases holding that if there was a cause of attachment existing, or the attachment was not wrongful or malicious, the fact that it was not prosecuted or was dismissed would not entitle the obligee in the bond to recover.

In *Smith v. Story*, 4 Humph. 169, mere want of success is held not to *per se* subject the obligors to liability; and the defendant can only recover if he shows actual damage: *Ranning v. Reeves*, 2 Tenn. Ch. 263.

Where the bond is to pay in case of failure to recover, final recovery is meant thereby: *Ball v. Gardner*, 21 Wend. 270; *Bennett v. Brown*, 20 N. Y. 99; though if a writ of error does not operate as a *supersedeas*, it will not affect the defendant's right to sue on the attachment bond, even while the main case is pending on error: *Bing Gee v. Ah Jim*, 7 Saw. 177.

The liability on the bond extends only to the writ for which it is given, and therefore, if attachment proceedings are commenced, a bond given, and the attachment then abandoned, and another attachment on the same property levied, it is held that the bond will not avail as a security on the second proceeding: *Erwin v. Commercial & R. R. Bank*, 12 Rob. (La.) 227.

*Form of Action.* — The technical form of action is of little consequence since the abolition of common-law forms of action in most of the states. But where it is of consequence, debt is the proper form, though covenant has been held to lie: *Drake on Attachment*, sec. 296; *Hill v. Rushing*, 4 Ala. 212.

*Parties.* — The proper and only party who can sue on an attachment bond is the defendant. From the fact that in most states the statute requires the bond to be given to the people, the people as the nominal obligee is often the nominal plaintiff, but the action is always to be brought, if not in the name of the defendant in attachment, at least for his use and benefit: *Wade on Attachment*, sec. 297; *Drake on Attachment*, sec. 162. Thus where a bond was given to the United States, it was held that the garnishee might bring an action on it in the name of the United States to his use: *Barnes v. Webster*, 57 Am. Dec. 232; and so where a bond was given to the sheriff, it was held that the suit might properly be brought in the name of the sheriff for the use of the parties in interest: *Wagner v. Romero*, 3 Pac. Rep. 50 (New Mex). The bond not being intended for the benefit of others, a third person whose property was levied on and seized cannot avail himself thereof, and this, though the bond was conditioned for the payment of "all costs and damages which might be awarded against the plaintiff, or sustained by any person, by reason of his suing out the attachment": *Davis v. Commonwealth*, 13 Gratt. 139; *Edwards v. Turner*, 6 Rob. 382; *Raspillier v. Brownson*, 7 La. 231; nor will the bond inure to the benefit of the officer executing the attachment: *Mitchell v. Chancellor*, 14 W. Va. 22. If, however, the bond be conditioned to pay damages to third persons as a garnishee, the bond being good as a common-law bond, though not authorized generally by attachment laws, will authorize a suit by such party: *Barnes v. Webster*, 57 Am. Dec. 232. Where the bond is in favor of all of several defendants, the action on the bond must be in the name of all, though the levy of the attachment was on

the separate property of each: *Boyd v. Martin*, 10 Ala. 700; *Masterson v. Phinney*, 56 Id. 336; and likewise in the case of a bond given to a partnership on attachment of partnership property: *Hearth v. Lent*, 1 Cal. 410; *Alexander v. Jacoby*, 23 Ohio St. 358. But it has been held that a separate right of action accrues to those of several defendants who alone were injured by the attachment, and that it is not necessary that the defendants against whom the attachment was rightfully obtained should be joined either as plaintiffs or defendants: *Alexander v. Jacoby*, *supra*. The sureties and principal obligor, whether the latter was the attachment plaintiff or not, may be joined as parties defendant in the action on the bond: *Jennings v. Joiner*, 1 Cold. 645. If the principal is sued alone, the sureties cannot be made liable upon the judgment, for they are not then parties to it: *Bunt v. Rheum*, 52 Iowa, 619. Where an administrator suing out an attachment executes the bond, describing himself therein as administrator, he may be made a party, and be liable personally on the bond, but he cannot be sued thereon in his representative capacity, nor can he subject the estate to an action for damages for his tortious conduct: *Gilmer v. Wier*, 8 Ala. 72.

*Pleading.* — It is a general rule that there should be sufficient in the declaration to show the execution of the bond; that the proceedings in attachment were oppressive and injurious to the plaintiff; the nature of the damages, and that they have not been paid: *Wade on Attachment*, sec. 299. In *ex parte* attachments, it is not sufficient to assign as a breach of the conditions of an attachment bond, that the defendant did not owe the debt for which the attachment was sued out; he must set out the proceedings under the attachment, and show that a judgment was given against him, and his property used to satisfy it; that he did not owe the debt; and that the attachment and judgment were illegal: *Hosshaw v. Hosshaw*, 8 Blackf. 258. It has been held that the declaration should show that the attachment was wrongfully and vexatiously sued out, and that thereby the obligee was damaged: *Flanagan v. Gilchrist*, 8 Ala. 621; even where the attachment has been quashed, and the property released, and these facts are alleged: *Eaton v. Bartscherer*, 5 Neb. 469. Where the declaration stated that the attachment had been wrongfully sued out by the obligors of the bond, instead of stating that it was so sued out by the plaintiff in the attachment suit, it was held defective: *McCullough v. Walton*, 11 Ala. 492. A declaration was held good on special demurrer, which alleged that the attachment was issued, tried, and adjudged to be void, without cause, tortious, and oppressive, and operated to put the defendant to great expense in defending himself: *Morris v. Price*, 2 Blackf. 457. In *Sprague v. Parsons*, 14 Abb. N. C. 320, it is said that if the attachment be void, malice or want of probable cause need not be averred. In Iowa, owing probably to the peculiar statute, it is necessary to allege that the plaintiff in attachment had no reasonable cause to believe the allegations in the affidavit, and it is not sufficient to allege that they were not true: *Winchester v. Cox*, 4 G. Greene, 121; *Raver v. Webster*, 66 Am. Dec. 96; *Bunt v. Rheum*, 52 Id. 619.

The defendant cannot deny the issuance of the attachment, when it is recited in the bond: *Love v. Kidwell*, 4 Blackf. 553.

The allegations concerning damages should show the real damage sustained and intended to be relied on. It is not necessary that the costs and expenses, i. e. the damages, shall be assessed prior to the action on the attachment bond, but the complaint must allege that costs and damages have accrued: *Dickinson v. McGraw*, 4 Rand. 158; *Winsor v. Orcutt*, 11 Paige, 578; and have not been paid; and a declaration which fails to aver the non-payment of the

damages sustained has been held bad on demurrer: *Michael v. Thomas*, 37 Ind. 501; *Uhrig v. Sinez*, 32 Id. 493; *Ryder v. Thomas*, 32 Iowa, 56; *Horner v. Harrison*, 37 Id. 378; *Pinney v. Hershfield*, 1 Mont. 367. Where the claim exceeds the amount of the penalty in the bond, it is held proper to assign the non-payment of the penalty; but if the damages do not equal the amount of the penalty, an averment that the damages have not been paid is the proper one: *Hill v. Rushing*, 4 Ala. 212.

Special damages should be alleged. Thus, under a general allegation of damage, it is held that the value of traveling expenses cannot be recovered: *State v. Blackman*, 51 Mo. 319. So under a claim for damages for injury by loss of hire and services of attached property, a verdict for its value will not be sustained: *Cox v. Robinson*, 2 Rob. (La.) 313. But an allegation that defendant has been compelled to spend large sums defending the attachment suit was held to cover special damage, including attorney's fees and hotel expenses: *Kelly v. Beauchamp*, 59 Mo. 178. In *Vorse v. Phillips*, 37 Iowa, 428, it is held that attorney's fees cannot be recovered unless specially pleaded. In Texas damage by deterioration of goods while under attachment must be specially pleaded: *Wallace v. Finberg*, 46 Tex. 35. A declaration which fails to aver the non-payment of damages sustained is bad on demurrer: *Michael v. Thomas*, 27 Ind. 501; *Ryder v. Thomas*, 32 Iowa, 56; *Pinney v. Hershfield*, 1 Mont. 367; *Hill v. Rushing*, 4 Ala. 212.

In an action brought after dismissal of the attachment, and appeal taken from such dismissal, it was held that plaintiff might amend his petition to show the decision rendered on appeal subsequent to the institution of the action on the bond: *McDaniel v. Gardner*, 34 La. Ann. 341.

*Evidence and Burden of Proof.* — In actions on attachment bonds, the writ and return and the record and proceedings in the attachment suit are competent evidence: *Raver v. Webster*, 66 Am. Dec. 96; *White v. Wyley*, 17 Ala. 167; *Drummond v. Stewart*, 8 Iowa, 341; *Hibbs v. Blair*, 14 Pa. St. 413. And in such actions admissions have been held competent evidence. Thus where the statutory ground of attachment was that the debtor had property which he refused to give in payment or security of the debt, the creditor's admission that the debtor had offered to secure the debt if proven against him was held conclusive against the creditor: *Drummond v. Stewart*, 8 Iowa, 341. So the admission of the defendant in attachment that he did the act for which the attachment was issued is admissible to prove that the attachment was not wrongfully sued out; and so would proof that the attachment suit was brought on the advice of counsel be evidence of want of malice: *Raver v. Webster*, 3 Id. 502. It has been held that the decision in the attachment suit concerning the truth of matters in the affidavit is conclusive evidence in an action on the bond: *Hoge v. Norton*, 22 Kan. 374; *Hayden v. Sample*, 10 Mo. 215; *Dunning v. Humphrey*, 24 Wend. 31. In *Sackett v. McCord*, 23 Ala. 651, it is held that the failure of the attaching plaintiff to sustain his action is undoubtedly *prima facie* evidence in support of the defendant's action on the bond; but is not conclusive proof that the attachment was either wrongfully obtained in the sense of being merely obtained without sufficient cause, or (as held in *Raver v. Webster*, 3 Iowa, 502) that the attachment plaintiff acted willfully wrong, that is, maliciously, in suing it out; nor (as held in *Nockles v. Eggemeier*, 47 Id. 400) is the fact that the attachment was voluntarily dismissed *prima facie* evidence that it was wrongfully sued out. But it is held that if no malice is involved, and the truth of the facts alleged as the ground of attachment were in issue, and the finding thereon is for the defendant and against the plaintiff, the judgment would conclusively estab-

lish that the attachment was wrongfully obtained: *Mitchell v. Mattingly*, 1 Met. (Ky.) 237; *Boatwright v. Stewart*, 37 Ark. 614; and likewise as to a judgment and finding on an issue as to the existence of the debt which was the basis of the attachment: *Lockhart v. Woods*, 38 Ala. 631; *Tucker v. Adams*, 52 Id. 254; *Gaddis v. Lord*, 10 Iowa, 141. Where the attachment was dismissed on account of technicalities, the plaintiff in the attachment was not allowed to show his reasons for suing out the attachment: *Hibbs v. Blair*, 14 Pa. St. 413; but on the contrary, see *Wood v. Barker*, 76 Am. Dec. 346.

In the absence of proof of malice, no evidence concerning damages, other than of direct injury resulting from the attachment, should be received. And proof of the effect on defendant's credit is not admissible, as will be seen under the head of "Damages," below.

**Burden of Proof.** — In actions on attachment bonds, the defendant in the attachment becomes the plaintiff, and assumes the burden of proof: *Burrows v. Lehdorff*, 8 Iowa, 96; that is, the burden is on him to prove all the material facts in issue, and that the attachment was wrongful; not that he must positively and affirmatively prove the latter, but it may be shown by proof of such facts and circumstances as tend to establish the wrongful character of the act: *Veiths v. Hagge*, 8 Iowa, 163; *Dent v. Smith*, 53 Id. 262; *Boatwright v. Stewart*, 37 Ark. 614. And where probable cause is set up as a defense, the burden is still on him to prove its non-existence: *Dent v. Smith*, 53 Iowa, 262. And the burden is on the defendant in attachment, as to matters arising under a counterclaim for damages for wrongful attachment, which he interposes against the demand sued on in the attachment suit.

**Damages.** — Damages in suits on attachment bonds are measured by the terms of the instrument: *Barnes v. Webster*, 57 Am. Dec. 232; and the recovery cannot exceed the amount of the penalty: *Hill v. Rushing*, 4 Ala. 212; and therefore, if the penalty be in blank, no recovery can be had: *Copeland v. Cunningham*, 63 Ala. 394. The recovery is limited, as a rule, to the amount of actual damages: *Reed v. Samuels*, 73 Am. Dec. 253; *Hays v. Anderson*, 57 Ala. 374; *Pounds v. Hamner*, Id. 342; *Moore v. Withenburg*, 13 La. Ann. 342. But in order to recover, it is not necessary for plaintiff, in the action on the bond, to show that he has paid the actual damage he has sustained: *Metcalfe v. Young*, 43 Ala. 643. The allowance for damages actually suffered should be liberal: *Campbell v. Chamberlain*, 10 Iowa, 337; *Lawrence v. Hagerman*, 56 Ill. 88; *Offutt v. Edwards*, 9 Rob. (La.) 90. Where the attachment is dismissed for mere irregularities, it is said that the sureties would not be liable for full damages: *Garretson v. Zacharie*, 8 Mart., N. S., 481.

As against the obligors in the bond, the defendant may recover for direct injuries only, such as loss from deprivation of enjoyment of his property, and the costs and expenses incurred in getting rid of the attachment: *Pettit v. Mercer*, 8 B. Mon. 51; *Reidhar v. Berger*, Id. 160; *Alexander v. Jacoby*, 23 Ohio St. 358; *Smith v. Eakin*, 2 Sneed, 456. It has been held that the surety is liable to the defendant in attachment for all damages up to the time of redelivery of the attached property where the attachment is dismissed as wrongful: *McReady v. Rogers*, 1 Neb. 124. The matter of probable cause or good faith in issuing attachment is not involved in the liability of the attachment plaintiff except in mitigation of damages, and will not affect the defendant's right to recover against him the actual damage he has sustained: *Alexander v. Hutchinson*, 9 Ala. 825; *Donnell v. Jones*, 48 Am. Dec. 59; *Durr v. Jackson*, 59 Ala. 203; *Pollock v. Gantt*, 69 Id. 373; *Churchill v. Abraham*, 22 Ill. 455. In *Sharpe v. Hunter*, 16 Ala. 765, it was held that where the attachment suit abated because of a defective affidavit, and the grounds for

the attachment were just, actual damages could not be recovered in an action on the bond. It is difficult to determine what is actual and what is speculative damage. Actual damage includes expenses and losses incurred in making defense to the attachment proceedings, and also loss occasioned by the deprivation of use of the property pending the attachment; or by illegal sale of it, or injury to or loss or destruction of it: *Cox v. Robinson*, 2 Rob. (La.) 313; *Pettit v. Mercer*, 8 B. Mon. 51; *Kelly v. Beauchamp*, 59 Mo. 178. Within this definition may be considered, as already stated, costs and expenses incurred in procuring the discharge of the attachment, costs and expenses of obtaining testimony on the trial after traverse of the affidavit: *Hayden v. Sample*, 10 Mo. 215; defendant's costs of suit generally: *Dunning v. Humphrey*, 24 Wend. 31; *Trapnall v. McAfee*, 3 Met. (Ky.) 34; *Winsor v. Orcutt*, 11 Paige, 578; as well on appeal as otherwise: *Bennett v. Brown*, 31 Barb. 158; S. C., 20 N. Y. 99. A condition in the bond to pay all costs that might accrue has been held to cover costs on the trial of the plea in abatement to the affidavit: *Hayden v. Sample*, 10 Mo. 215.

As to counsel fees generally, it is held that the defendant will be allowed to recover amounts paid to counsel for services in defending the attachment suit: *Trapnall v. McAfee*, 77 Am. Dec. 152; *Offutt v. Edwards*, 9 Rob. (La.) 90; *Seay v. Greenwood*, 21 Ala. 491; *Burton v. Smith*, 49 Id. 293; *Higgins v. Mansfield*, 62 Id. 267; *Dothard v. Sheid*, 69 Id. 135; *Morris v. Price*, 2 Blackf. 457; *Vorse v. Phillips*, 37 Iowa, 428; *Porter v. Knight*, 63 Id. 365; *Phelps v. Coggeshall*, 13 La. Ann. 440; *Accessory Transit Co. v. McCerren*, Id. 214; *Swift v. Plesmer*, 39 Mich. 178; *Raymond v. Green*, 12 Neb. 215; *Northrup v. Garrett*, 24 N. Y. Sup. Ct. 497; but see, on the contrary, *Heath v. Lent*, 1 Cal. 410; *Hughes v. Brooks*, 36 Tex. 379; but such fees only are recoverable, and not fees for defending the whole case: *Porter v. Knight*, 63 Iowa, 365. Counsel fees paid by defendant to attorneys employed to defend the garnishee from liability are not allowed: *Pounds v. Hamner*, 57 Ala. 342; *Hays v. Anderson*, Id. 374; *Flournoy v. Lyon*, 70 Id. 308; nor can recovery be had of fees paid to counsel for services in the action on the bond: *Hays v. Anderson*, 57 Id. 374; *Plumb v. Woodmansee*, 34 Iowa, 116; *Vorse v. Phillips*, 37 Id. 428; *Offutt v. Edwards*, 9 Rob. (La.) 90. See *Shultz v. Morrison*, 3 Met. (Ky.) 98, and *Trapnall v. McAfee*, Id. 34, where it is held that only such fees as are proved to be reasonable can be recovered. In *Tyler v. Safford*, 3 Pac. Rep. 333 (Kan.), plaintiff in a suit for damages for wrongful attachment employed an attorney from another county, who usually attended to his business, and he claimed traveling expenses of such attorney as part of his damages. The court left the question, as to whether such expenses were reasonable and proper, to the jury. In Texas, the court refused to allow for the defendant's time spent and expenses incurred in defense of the suit: *Harris v. Finberg*, 46 Tex. 79; *Craddock v. Goodwin*, 54 Id. 578; and in Missouri traveling expenses are held not to be part of the necessary disbursements occasioned by the attachment: *State v. Blackman*, 51 Mo. 319.

In the class of damages which are recoverable is embraced depreciation in value of the property by reason of the seizure: *Kisler v. Carr*, 34 Cal. 641; *Lowenstein v. Monroe*, 55 Iowa, 82; *Mitchell v. Harcourt*, 62 Id. 349; and this cannot be established (so it has been held) by the opinion of witnesses: *Pollock v. Gantt*, 69 Ala. 373; S. C., 44 Am. Rep. 519; *Alexander v. Jacoby*, 23 Ohio St. 358. Where the property seized is personalty, depreciation in price while held under attachment is recoverable: *Frankel v. Stern*, 41 Cal. 168; and so damages are recoverable for injury to material procured for the purpose of performing some contract, which performance, by reason of the at-

tachment, is hindered, and the property allowed to go to waste, or thereby depreciated in value: *Carpenter v. Stevenson*, 6 Bush, 259. The extent to which the property depreciates is held to be the measure of damage to the owner whether the price be affected by actual injury to the goods, or by the changing of the market price: *Fleming v. Bailey*, 44 Miss. 132; and the same rule has been held applicable to bonds and bank notes seized on attachment: *Horn v. Bayard*, 11 Rob. (La.) 259. In *Hoag v. Norton*, 21 Kan. 374, it was held that recovery might be had for loss to the owner of growing cattle, by their failure to increase in weight, which they would have done had they been left in the owner's possession. It has been held that the cost of replacing property would be the measure of recovery: *Seke v. Belden*, 48 Iowa, 451; but this is evidently not the rule applicable to all cases, as is evident from the instances above. Rent of a building in which goods were stored, pending detention on attachment, is recoverable as part of the damages for wrongful attachment: *Lowenstein v. Monroe*, 55 Id. 82; *Mitchell v. Harcourt*, 62 Id. 349. Where the property is of such a nature that from the loss of its use damage will result, the value of such use is held to be recoverable, and is the measure of damages in such cases: *Reidhar v. Berger*, 8 B. Mon. 160; *Carpenter v. Stevenson*, 6 Bush, 259.

Remote or speculative damages resulting from injuries to credit, business, character, or feelings, cannot be recovered: *Reidhar v. Berger*, 8 B. Mon. 160; *Donnell v. Jones*, 48 Am. Dec. 59; *Floyd v. Hamilton*, 33 Ala. 235; *Higgins v. Mansfield*, 62 Id. 267; *Pollock v. Gantt*, 69 Id. 373; *Holliday v. Cohen*, 34 Ark. 707; *Oberne v. Gaylord*, 13 Bradw. 30; *Campbell v. Chamberlain*, 10 Iowa, 337; *State v. Thomas*, 19 Mo. 613; as for injury to his credit, etc., the defendant must in general obtain relief through an action on the case. In *Swift v. Plessner*, 39 Mich. 178, however, where the defendant's business was injured by the attachment, all the facts were allowed to go to the jury, and damages were allowed; and likewise in Ohio, it being there held, however, that only damages for necessary loss of business should be allowed, and not for possible injury to the reputation of goods: *Alexander v. Jacoby*, 23 Ohio St. 358. In *Brandon v. Allen*, 28 La. Ann. 60, and *Heath v. Lent*, 1 Cal. 410, it was held that the attachment of realty would not operate to depreciate its value, and hence no recovery could be had therefor.

Because one attachment usually results in subsequent attachments by all of the defendant's creditors, it does not follow, if the first attachment is defeated, that the plaintiff in the first suit is responsible for all damage from the other attachments because of such, his first attack. But each creditor is responsible alone for the injury occasioned by himself: *Marquez v. Southimer*, 59 Miss. 430.

*Exemplary Damages.* — As a rule, in actions on attachment bonds, exemplary damages cannot be recovered. But in *Johnson v. Farmers' Bank*, 4 Bush, 283, it is held that even in actions on attachment bonds against the principal obligor and the sureties, a distinction is to be made between cases where the attachment was simply wrongful, because it was unlawful, or the affiant was mistaken as to the facts, and where it was willfully wrong, vexatious, or unsupported by probable cause; and that in cases falling under the former class, the recovery is limited to such expenses as are caused in defending against the attachment; while in the latter, the party suing on the bond may recover damages commensurate with the injury sustained. And courts go still further, and say that where the attachment is clearly vexatiously sued out, the obligor and sureties may be liable for vindictive damages: *Reed v. Samuels*, 73 Am. Dec. 253; *Floyd v. Hamilton*, 33 Ala. 235; *Metcalf v. Young*,



43 Id. 643; *Hays v. Anderson*, 57 Id. 374; *Accessory T. Co. v. McCerren*, 13 La. Ann. 214; but in such case the malice must be averred: *Doll v. Cooper*, 9 Lea, 576; and clearly established, and must also be shown to be directed to the party complaining thereof: *Wood v. Barker*, 76 Am. Dec. 346; *Pollock v. Gantt*, 69 Ala. 373; S. C., 44 Am. Rep. 519. Mere want of probable or reasonable cause is not sufficient to authorize the recovery of such damages: *Nordhaus v. Peterson*, 54 Iowa, 68; and advice of counsel may be set up as evidence of want of malice, to prevent recovery of exemplary damages: *Raver v. Webster*, 66 Am. Dec. 96.

*Counterclaim and Set-off.* — The matter of set-off or counterclaim by the defendant against the plaintiff's action, of a claim under the bond for damages by reason of wrongful attachment, will be governed by the general rules governing counterclaims and set-offs against contracts generally, as provided by the statutes of the various states. A set-off has been allowed where the damages were capable of liquidation: *Veiths v. Hagge*, 8 Iowa, 163; *Nordhaus v. Peterson*, 54 Id. 68; *Hunt v. Gilmore*, 59 Pa. St. 450; *Halfpenny v. Bell*, 82 Id. 128; *Phinkett v. Sauer*, 101 Id. 356. So a set-off of an unliquidated demand has been allowed against an action on the bond in states where the statutes concerning set-off allowed the setting up of an unliquidated demand: *Raymond v. Green*, 12 Neb. 215; S. C., 41 Am. Rep. 763; but see, *contra*, *State v. Eldridge*, 65 Mo. 584.

*Defenses to Actions on Attachment Bonds.* — Many of the defenses to these actions have already been stated or suggested above, and will not be repeated here.

A general rule which need hardly be stated is, that there can be no recovery on a bond which is void in itself: *Benedict v. Bray*, 2 Cal. 251; *Copeland v. Cunningham*, 63 Ala. 394. In the latter of the above cases, it is held that a bond expressing no penalty is void, and cannot be validated by parol proof of the penalty it was intended to insert. If the bond be not executed in conformity to the statute, and still be valid as a common-law bond, it will be effective as such, and the irregularity cannot be set up as a defense to an action on the bond: *Barnes v. Webster*, 57 Am. Dec. 232. The fact that the bond has been destroyed or lost, and cannot be produced on the trial, is not necessarily a release from liability thereon: *Bennett v. Brown*, 20 N. Y. 99. The fact that the bond was not given until after the issuance of the writ cannot be set up as a defense: *Sumpter v. Wilson*, 1 Ind. 244. Nor can the obligors in the bond, when sued thereon, deny that the attachment was issued as recited therein: *Love v. Kidwell*, 4 Blackf. 553. Technical defenses must be raised in the trial court, or they will not be noticed on appeal: *Northrup v. Garrett*, 17 Hun, 497. It is held to be no defense that the statute under which the attachment was sued out is void: *State v. Stark*, 75 Mo. 566. Advice of counsel in bringing the attachment suit is no defense to an action for a wrongful attachment, though it may be shown to prevent a recovery of exemplary damages: *Raver v. Webster*, 66 Am. Dec. 96. Incompetency, as for instance, insanity, has been held not a defense on the part of one who usually transacted his own business, and was not known to be insane by the obligee at the time the bond was executed: *Behrens v. McKenzie*, 23 Iowa, 333.

The mere fact that the surety has given up to his principal all collateral security, which he had for his own indemnity, thinking the suit ended, is no defense on his part: *Kerr v. Reeca*, 27 Kan. 469. The surety may be released from liability by the surrender of other security, which he has received from the attachment plaintiff, to the extent thereof: *Baird v. Rice*, 1 Call, 18. So he is entitled as a matter of defense to the benefit of all payments made by



his principal: *Baere v. Armstrong*, 33 N. Y. Sup. Ct. 19. Destruction of the property attached will not relieve the surety from liability: *Irvin v. Howard*, 37 Ga. 18.

Belief in the truth of the allegations of the affidavit, if they are really false, is no defense to an action on the bond: *Pettit v. Mercer*, 8 B. Mon. 51; *Alexander v. Hutchinson*, 9 Ala. 825; *Churchill v. Abraham*, 22 Ill. 455; though in Iowa the contrary is the established law, and this may also obtain in other states: *Raver v. Webster*, 66 Am. Dec. 96; *Winchester v. Cox*, 4 G. Greene, 121; *Mahnke v. Damon*, 3 Iowa, 107; *Burton v. Knapp*, 14 Id. 196; *Vorse v. Phillips*, 37 Id. 428; *Carey v. Gunnison*, 51 Id. 202; *Bunt v. Rheum*, 52 Id. 619. It is neither a defense nor a circumstance in mitigation of damages that the claim sued on was a just one, if the ground for attachment did not exist; for the claim may be just, and yet the attachment wrongful, and even willfully wrongful: *Drummond v. Stewart*, 8 Iowa, 341. While it is no defense that other grounds of attachment than those on which the writ was issued, and which failed to sustain it, existed, such fact may be shown in mitigation of damages: *Lockhart v. Woods*, 38 Ala. 631; and the same may be said where, though the attachment failed, the same property was subsequently seized and sold on another writ for the same debt which was the basis of the former attachment: *Earl v. Spooner*, 3 Denio, 246. But it cannot be shown in mitigation of damages, any more than it can be set up as a defense, that the attachment was issued under a void writ: *Kelly v. Archer*, 48 Barb. 68. The attachment plaintiff cannot set up in defense of a wrongful attachment that the attached property was not the property of the defendant in attachment, if he avers in his complaint that it is the defendant's: *Brandon v. Allen*, 28 La. Ann. 60. But see the case of *Pinson v. Kirsh*, 46 Tex. 26, where on attachment of property as that of defendant, and which proved not to be his, the defendant was not allowed to recover actual damages to himself by causing his detention pending the decision in the attachment suit.

*Liability for Seizure of Exempt Property.* — The plaintiff, where he becomes the purchaser of exempt property, seized on his attachment, with knowledge of its character, is liable to the debtor for the value thereof: *Murphy v. Sherman*, 25 Minn. 196; but he is not liable for the officer's acts in refusing to set off, or allow to be selected, property claimed to be exempt: *Michels v. Stark*, 44 Mich. 2.

*Liability for Seizure of Property of Third Persons.* — A plaintiff in attachment is liable for levying upon the property of one other than the defendant: *Meade v. Smith*, 16 Conn. 346; *Sangster v. Commonwealth*, 17 Gratt. 124; *Shay v. Morgan*, 9 Mart. (La.) 592; *Woodberry v. Long*, 8 Pick. 543; *Caldwell v. Arnold*, 8 Minn. 265; *Ford v. Dyer*, 26 Miss. 243; *Marsh v. Backus*, 16 Barb. 483; and this would include a levy upon and sale of partnership property in an action against an individual partner: *Haynes v. Knowles*, 36 Mich. 407. And the plaintiff is as well liable, if he ratify such a wrongful levy by the attaching officer, though originally made against his express direction: *Knight v. Nelson*, 117 Mass. 458; *Oestrich v. Greenbaum*, 9 Hun, 242; and this is the rule whether the attachment proceedings were regular or not.

**MALICIOUS ATTACHMENTS.** — We have just considered the liability upon attachment bonds, for wrongful attachments, and have stated a number of general rules applicable to all attachments improvidently, wrongfully, or maliciously sued out. It is now the intention to discuss the additional and special rules applicable to attachments vexatiously or maliciously sued out.

It is uniformly held that an attachment plaintiff may be subjected to damages for attaching the defendant's property maliciously and without probable

cause: Drake on Attachment, sec. 726; and his remedy in this regard is not in any way interfered with by the plaintiff in the attachment suit, having given a bond to pay all costs and damages for wrongful issuance of the attachment, as has already been stated at the head of this note, where a large number of cases so deciding are also collected. Nor is the defendant precluded from his action for damages by having given a delivery bond for property attached: *Alexander v. Jacoby*, 23 Ohio St. 358; nor again by having consented to a dismissal of the attachment suit: *Spaulding v. Wallett*, 10 La. Ann. 105; *Kinsey v. Wallace*, 36 Cal. 462.

Malice is indispensable to an action on the case, for wrongful attachment: *McKellar v. Couch*, 34 Ala. 336; *Benson v. McCoy*, 36 Id. 710. An attachment by a plaintiff knowing that he had no cause of action is *prima facie* malicious: *Myers v. Wright*, 44 Iowa, 38; *Hargerd v. Spofford*, 46 Id. 11; *Spengler v. Davy*, 15 Gratt. 311; and where there is no evidence of any cause of action, the jury may infer plaintiff's knowledge of the fact that his action was groundless: *Ives v. Bartholomew*, 9 Conn. 309. This action cannot be maintained against an attachment plaintiff for malicious attachment obtained without his knowledge, as by an attorney employed to collect a debt: *Kirksey v. Jones*, 7 Ala. 622; *Pollock v. Gantt*, 69 Id. 373. But if the plaintiff had given the attorney *carte blanche* to use his name in the commencement of suits, he cannot shield himself this way: *Kinsey v. Wallace*, 36 Cal. 462; *Wood v. Wier*, 5 B. Mon. 544. When an affidavit is shown to be willfully false, a case of malicious attachment is made out: *Nelson v. Danielson*, 82 Ill. 545; *Tomlinson v. Warner*, 9 Ohio, 103. And if no valid debt exist, the rule is applicable: *Nelson v. Danielson*, 82 Ill. 545. Where the statute provides for no indemnity bond against damage by mere errors of judgment or mistakes of procedure, the plaintiff can only be held liable, on failure of his suit, for maliciously prosecuting his action: *Sledge v. McLaren*, 29 Ga. 64; *Preston v. Cooper*, 1 Dill. 589.

Liability may arise as well on a foreign as on a domestic attachment: *Wiley v. Traivick*, 14 Tex. 662. It is not essential to a recovery that the attachment plaintiff himself should have directed the levy. If he made the affidavit, maliciously and vexatorially, it is sufficient: *Walser v. Thies*, 56 Mo. 89.

*Malice — Probable Cause — Evidence — Burden of Proof.* — In an action for malicious attachment, the burden of proof of malice would be on the plaintiff therein seeking to establish it: *O'Grady v. Julian*, 34 Ala. 88; *Lawrence v. Hagerman*, 56 Ill. 68; S. C., 8 Am. Rep. 674; *Wilson v. Outlaw*, Minor, 367; *McLaughlin v. Davis*, 14 Kan. 168; *Mitchell v. Mattingly*, 1 Met. (Ky.) 237; *Accessory Transit Co. v. McCerren*, 13 La. Ann. 214; *Myers v. Farrell*, 47 Ala. 281. Malice in such cases would seem to be a legal inference from want of probable cause, and the fact of want of probable cause a question for the jury. But the authorities do not support this view, and the decided cases seem to hold that the question of probable cause is one for the jury from which they may infer malice: *Holliday v. Sterling*, 62 Mo. 321; *Mayfield v. Cotton*, 21 Tex. 1; *Willis v. McNeil*, 57 Id. 475. Probable cause may itself be inferred from other facts, as the falsity of the affidavit, that the debt was not due, etc.: *Nelson v. Danielson*, 82 Ill. 545; and consists of a reasonable belief in the existence of facts necessary to sustain an attachment, such belief being founded on circumstances which would be sufficient to produce such a belief in a man of ordinary caution; that is, it is belief founded on reasonable grounds: *Spengler v. Davy*, 15 Gratt. 381; *Spaide v. Barrett*, 57 Ill. 289; S. C., 11 Am. Rep. 10; *McCullough v. Grishobber*, 4 Watts & S. 201. If a person commences an action knowing that he has no just cause, this is held

evidence of malice: *Ives v. Bartholomew*, 9 Conn. 309; *Alexander v. Harrison*, 38 Mo. 258. Where the judgment in the original suit on the merits went against plaintiff, it was held that this was conclusive evidence against him on the question of probable cause in an action for malicious attachment: *Jones v. Kirksey*, 10 Ala. 839; *Fearle v. Simpson*, 2 Ill. 30; *Pizley v. Reed*, 26 Minn. 80; *Bump v. Betts*, 19 Wend. 421; *Fortman v. Rottier*, 8 Ohio St. 548. Where there was no debt there can be no good faith in swearing to the contrary, and therefore no reasonable ground to believe what plaintiff must know not to be true: *Myers v. Wright*, 44 Iowa, 38; and likewise where the debt was not due and plaintiff knew it: *Nelson v. Danielson*, 82 Ill. 545. So if the plaintiff, though having a cause of action, alleges facts as ground for the attachment, knowing them to be false, this is held evidence of malice: *Tomlinson v. Warner*, 9 Ohio, 103. The malice must be against the defendant in attachment; if against a third person, it will not be ground for damages: *Wood v. Barker*, 76 Am. Dec. 346. Where one sued an attachment out of a court having no jurisdiction, this was held evidence of malice: *Boon v. Maul*, 3 N. J. L. 862. If an attachment is properly sued out, but the property attached is afterwards maliciously detained, it is held that the action for malicious attachment will not lie: *Stone v. Swift*, 16 Am. Dec. 340.

Belief, reasonably founded, in the existence of the grounds for attachment, though the facts alleged be untrue, is held to be evidence of probable cause: *Williams v. Hunter*, 3 Hawks, 545; *McCullough v. Grishobber*, 4 Watts & S. 201; *Smith v. Story*, 4 Humph. 169. But mere representations by a third party, and without further inquiry by plaintiff, are not sufficient to justify such belief on plaintiff's part so as to be a defense to an action for malicious attachment: *Schrimpf v. McArdle*, 13 Tex. 368. The declarations of the debtor that he was about to leave the state, made just prior to the attachment, were held not admissible for the attachment plaintiff, if they had not come to him until after the attachment, as then they could not have influenced his belief: *Harris v. Taylor*, 13 Ala. 324. Evidence that other attachments had been issued prior to his own has been held admissible as evidence for the attachment plaintiff, tending to rebut the presumption of malice, in that it strengthened his belief in his grounds for attachment: *Yarborough v. Hudson*, 19 Ala. 653; *Goldsmith v. Picard*, 27 Id. 142; *Lockhart v. Woods*, 38 Id. 631. Advice of counsel has often been set up as evidence of probable cause, but it is held at most to be but a fact to go to the jury, from which they may infer probable cause: *Raver v. Webster*, 69 Am. Dec. 96; *Jacobs v. Crum*, 62 Tex. 401; see also *Stone v. Swift*, 16 Am. Dec. 349; *Alexander v. Harrison*, 38 Mo. 258.

It has been held that the plaintiff, as a defense to show probable cause, may prove the existence of other grounds of attachment than that on which his attachment did issue: *Kirksey v. Jones*, 7 Ala. 622; *Lockhart v. Woods*, 38 Id. 631. And to repel the presumption of malice, evidence has even been admitted of the fact that defendant, in another state, ran away to escape debtors: *Melton v. Troutman*, 15 Ala. 535.

Any evidence going to show the justice of plaintiff's demand, though it does not prove probable cause, tends to do so, and is admissible for that purpose: *Marshall v. Betner*, 17 Ala. 832. Where plaintiff has recovered judgment, it has been held conclusive evidence of probable cause until reversed: *Jones v. Kirksey*, 10 Id. 839; *Durr v. Jackson*, 59 Id. 203.

*Form of Action and Time within Which It may be Brought.*—Where the common-law forms of action exist, case is ordinarily the proper form of action: *Shaver v. White*, 8 Am. Dec. 730; *Seay v. Greenwood*, 21 Ala. 491; *Owens v.*

*Starr*, 2 Litt. 231; *Ivy v. Barnhart*, 10 Mo. 151; *Tomlinson v. Warner*, 9 Ohio St. 103; but where the plaintiff has directed a levy on the property of a third person, or when the levy is for any reason unauthorized and void, trespass would be the proper form: *Lyon v. Yates*, 52 Barb. 237; *Lamb v. Day*, 8 Vt. 407.

The action will not lie until the attachment shall have terminated in favor of the defendant: *Bump v. Betts*, 19 Wend. 421; *Rea v. Lewis*, Minor, 382; *Nolle v. Thompson*, 3 Met. (Ky.) 121; *Pixley v. Reed*, 26 Minn. 80; *Sloan v. McCracken*, 7 Lea, 626; *Stewart v. Sonneborn*, 98 U. S. 187; but a failure to allege that such is the case will be cured by verdict: See cases just cited, and *Feazle v. Simpson*, 1 Scam. 30; *Spaids v. Barrett*, 57 Ill. 289. By the above, however, it is not to be understood that the main action must be concluded, but only the attachment part of it: *Bliss v. Heasty*, 61 Id. 338. It is not necessary to bring an action on the bond before the action for malicious prosecution will lie: *Smith v. Story*, 4 Humph. 169.

**Pleading.** — Malice and want of probable cause must be alleged to sustain an action for malicious attachment: *Preston v. Cooper*, 1 Dill. 589; but this particular language need not be used if the equivalent be stated: *Spaids v. Barrett*, 57 Ill. 289; S. C., 11 Am. Rep. 10; *Kinsey v. Wallace*, 36 Cal. 62. But it is not sufficient to allege that the attachment issued without legal or justifiable cause; want of probable cause must be alleged: *King v. Montgomery*, 50 Cal. 115; *Ives v. Bartholomew*, 9 Conn. 309; *Sledge v. McLaren*, 29 La. 64; *Lawrence v. Hagerman*, 56 Ill. 68; *Spaids v. Barrett*, 57 Id. 289; *Mitchell v. Mattingly*, 1 Met. (Ky.) 237; *Wood v. Weir*, 5 B. Mon. 544; *Senecal v. Smith*, 9 Rob. (La.) 418; *Accessory T. Co. v. McCerren*, 13 La. Ann. 214; *Lindsay v. Larned*, 17 Mass. 190; *Wills v. Noyes*, 12 Pick. 324; *Bump v. Betts*, 19 Wend. 421; *Boon v. Maul*, 3 N. J. L. 862; *Williams v. Hunter*, 3 Hawks, 545; *McCullough v. Grishobber*, 4 Watts & S. 201; *Tomlinson v. Warner*, 9 Ohio, 103; *Fortman v. Rottier*, 8 Ohio St. 548; *Wiley v. Trainwick*, 14 Tex. 662; *Young v. Gregoric*, 3 Call, 446. An allegation that the writ was sued out "wrongfully and without good cause" has been held sufficient: *Spengler v. Davy*, 15 Gratt. 381. Plaintiff should aver in his declaration in an action for malicious attachment that the affidavit in the attachment proceeding was false, before the other party can be called on to sustain the truth of it: *Tiller v. Shearer*, 20 Ala. 527; *Dunn v. Jackson*, 59 Id. 203; *Flournoy v. Lyon*, 70 Id. 308.

**Damages.** — In some respects the measure of damages is the same for wrongful as for malicious attachments. Actual damages may be recovered, and they are such as have been already stated. But in actions for malicious attachment, damages may be allowed far beyond these. Loss of credit, business, customers, reputation, and the like may all be allowed for: *Donnell v. Jones*, 48 Am. Dec. 59; *Goldsmith v. Picard*, 27 Ala. 142; *O'Grady v. Julian*, 34 Id. 89; *Flournoy v. Lyon*, 70 Id. 308; *Mitchell v. Mattingly*, 1 Met. (Ky.) 237; *Lawrence v. Hagerman*, 56 Ill. 68; S. C., 8 Am. Rep. 674; *Myers v. Farrell*, 47 Miss. 281. In such cases, verdicts will not, as a general rule, be disturbed because excessive: *Kinsey v. Wallace*, 36 Cal. 462; *Myers v. Farrell*, 47 Miss. 281; unless the sum is grossly disproportionate to the injury: Id.

In mitigation of damages, the declarations of the plaintiff at the time of attachment are inadmissible as part of the *res gestæ*: *Wood v. Barker*, 76 Am. Dec. 346; and justice of a demand, the suit for which has been defeated by technicalities, is held admissible to reduce damages: *Cox v. Robinson*, 2 Rob. (La.) 313. But if the truth of the affidavit has been determined in the principal suit, it cannot be set up as a defense in the action for malicious prosecution: *Hayden v. Sample*, 10 Mo. 215.

It may be shown in mitigation of damages that the attached property has been returned to and accepted by the plaintiff: *Lyon v. Yates*, 52 Barb. 237; or that a valid attachment for the same cause or debt was subsequently sued out: *Otis v. Jones*, 21 Wend. 394; *Wehle v. Speelman*, 25 Hun, 99; *Melton v. Troutman*, 15 Ala. 535.

By Greenleaf it is stated that the rules as to damages in these cases are those which will be found applied to all other cases of malicious prosecution, and he also states what these are: See 2 Greenl. Ev., sec. 456.

THE PRINCIPAL CASE IS CITED to the point that in order to justify a recovery upon the attachment bond, it must appear not only that the ground alleged for the suing out of the attachment does not exist, but that the defendant had no reasonable cause to believe it existed: *Nordhaus v. Peterson*, 54 Iowa, 69, 71. In *Vorse v. Phillips*, 37 Id. 428, it is held that in an action for damages for the wrongful suing out of an attachment, the defendant may show in defense either, that he had good cause to believe the grounds stated for the writ to be true, or that they were true in fact. If true in fact, it would constitute a good defense, though at the time of the suing out of the writ he had not sufficient knowledge to constitute reasonable ground for believing them to be true. And the principal case is explained as not in conflict with this doctrine.

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## DENE GRE v. HAUN.

[14 IOWA, 240.]

**DELAY BY CREDITOR IN ENFORCING DEBT CONTRACTED BEFORE PASSAGE OF HOMESTEAD LAW**, which debts, the law provides, may be satisfied out of the homestead after exhausting the other property of the debtor subject to execution, does not prevent the creditor from seizing the homestead, if at the time of his levy the judgment debtor had no other leviable property, notwithstanding after the maturity of the claim or during the pendency of the judgment lien the debtor had abundance of other property, which in the mean time is disposed of either voluntarily or by judicial sale.

**STATUTORY PROVISION THAT OTHER PROPERTY OF DEBTOR SHALL BE EXHAUSTED** in satisfaction of debts antecedent to homestead law, before resort is had to the homestead, is directory merely, and a failure to observe it does not affect the title of a purchaser of the homestead at the judicial sale. *Per Lowe, J.*

**ACTION** of right by Denegre, who claims the property under purchase at judicial sale under his judgment against the defendant Haun, who claims the property as a homestead. The opinion states the case.

*Grant and Smith*, for the appellant.

*Cook and Drury*, for the appellee.

By Court, **LOWE, J.** The prime and chief difficulty in this case is in separating from it the mass of foreign matter and questions in which the learning of counsel has invested it.

The real points in the case are few, simple, and by no means difficult of determination. The action is right, founded upon a title derived from a judicial sale. Counsel for the defense introduce and press in argument a number of collateral questions which have no appropriate place in the cause, and which we may dispose of *in limine*.

For instance, it is stated that the judgment under which, and to satisfy which, the property was sold, was founded upon two other judgments obtained in the years 1847 and 1848; and that these judgments were therefore merged in the latter, and the lien created upon the property of the defendant, by virtue thereof, is discharged. Conceding this to be the legal consequence of such a proceeding, we ask, what of it? How does it benefit the defendant? No question of liens, or the priority of liens between creditors, is made or can arise in this case. Again, the question whether the homestead law affects the contract, or pertains alone to the remedy, comes in for a large share of the discussion. The unimportance of this question is apparent from the fact that the law is framed to save all antecedent debts. Still again, it was argued that in 1852 the defendant Haun mortgaged all his property, including that now in controversy, to one Milligan, who assigned to one Thatcher; that subsequently, in foreclosing this mortgage, Denegre, with a large number of other encumbrancers, were made parties; that Denegre, the plaintiff in this suit, failed to appear, but made default, and a judgment of foreclosure was entered, and this circumstance is supposed to have concluded Mr. Denegre in some way, but in what way and to what extent is not specifically stated. Certainly it did not supersede his judgment or render it nugatory. It may have had the effect to postpone it to that of the Milligan-Thatcher decree. But this is no reason why Denegre should not have his judgment satisfied, if he can find property liable to be seized. And so with regard to some other collateral questions equally remote and immaterial, which it is not necessary to refer to. The land in controversy was sold by the sheriff on an execution which had regularly issued upon a judgment rendered in favor of the plaintiff against the defendant, on the nineteenth day of September, 1854. The judgment, levy, and sheriff's deed, being regular or at least unimpeached, the purchaser had a right to depend upon these, and in exhibiting the same on trial, makes for himself a *prima facie* right to recover in this case. The defendant, however, claims that the *locus in quo*



was his homestead, and therefore exempt from levy and sale. The record shows that the debts for which the judgment was rendered were contracted prior to the passage of the homestead law. In such a contingency, the said law declares in terms that the homestead may be sold on execution, to supply a deficiency remaining, after exhausting the other property of the debtor which is liable to execution.

The defendant, anticipating perhaps that he would not be able to protect his homestead from the payment of antecedent debts, places his defense, especially in argument, chiefly upon the ground that the officer did not first exhaust the other property of the defendant. But we think this position is unsustained by the facts in the record. At the time of the issuing of plaintiff's execution, under which he now claims title to the premises in controversy, it is conceded that there were unsatisfied judgments against the defendant to the amount of some thirty thousand dollars; that some of these judgments were anterior, and some subsequent in point of time, to the date of plaintiff's judgment, rendered in September, 1854; that on some of these judgments executions had been returned *nulla bona*, and that a similar return had been made on two executions that had previously issued upon plaintiff's last judgment; that the property of defendant, subject to execution, had been sold by Milligan, under his mortgage, given in 1852 to secure the payment of \$8,262, and the judgment of Doan, King, & Co., obtained in the same year; that the facts disclosed by the record show that Haun had no property upon which a levy could be made at the date of plaintiff's execution, except, perhaps, eighty acres, of which the forty acres now in controversy was a part; and the other forty, agreeably to the return on the execution, was sold first, without obtaining a sufficient amount to satisfy the debt.

Admitting all this to be true, the defendant nevertheless contends that the judgment under which the plaintiff sold and purchased the property was founded on two other judgments, rendered in 1847 and 1848, upon promissory notes executed and delivered in 1846; that they operated as liens upon all the real estate which he then had; and that although he had an ample amount to satisfy said judgment, aside from his homestead, the plaintiff neglected to levy upon and exhaust the same; that a failure to do so now precludes him, in law, from selling the homestead, although his claim may antedate the law granting the same. This ground of defense possesses



little merit, and derives no support from the law. It is true, in our opinion (as held in the case of *Purdy v. Doyle*, 1 Paige Ch. 558), the plaintiff lost his lien under his first judgments by the character of the proceedings which he adopted in obtaining his last judgments, on the 19th of September, 1854. But this is an immaterial circumstance. He is in no worse condition thereby than if he had brought no suit whatever on his notes till September, 1854; and would it be said in that event that a failure to prosecute an antecedent claim to judgment, at maturity, so as to subject any personal property or real, which the debtor might have apart from the homestead, to its satisfaction, would impair the creditor's right to go upon the homestead? This effect does not and ought not to follow such delay. The indulgence thus granted may affect the rights of the creditor, but it furnishes no ground of complaint to the debtor, who, taking advantage of the delay, sells or mortgages the property, and pockets the proceeds; or it may be that it is taken to satisfy other encumbrances against him. The plaintiff's judgment being valid, founded upon a claim antecedent to the passage of the homestead law, creating a lien that was still existing and unimpaired, he does not, by delay, lose his right to seize the homestead, if at the time of his levy the judgment debtor had no other property out of which the execution could be satisfied, and that, too, notwithstanding after the maturity of the claim, or during the pendency of the plaintiff's judgment lien, the debtor had an abundance of other property for that purpose. These views, we think, are sustained by a fair construction of our statutes, and derive support from the following authorities: *Benner v. Phillips*, 9 Watts & S. 13, 18; *Addams v. Heffernan*, 9 Watts, 529; *Wells v. Baird*, 3 Pa. St. 351; and *Turner v. Lawrence*, 11 Ala. 426.

The foregoing exposition of the questions made disposes of this case adversely to the defendant, and the judgment will necessarily have to be reversed and remanded.

There is another principle, however, suggested and discussed by counsel for the appellant, which lies at the bottom of this case, is involved in the assignment of errors, and upon which the writer of this opinion believes the decision of the case at bar should be made mainly to turn. In alluding to it, I speak for myself, and not for my associates, who desire to express no opinion thereon at present, believing it unnecessary to do so. I think otherwise, and will briefly state the point.

The power being expressly granted to sell the homestead to

satisfy antecedent debts, the non-observance of the directory part of the law by the officer, in exhausting the other property of the debtor first, is an immaterial circumstance in this controversy, and if it was not done, it would not, in this collateral proceeding, have the effect to vitiate the plaintiff's title, nor could it amount to a legitimate defense in an action of this kind. This precise principle or question of practice was settled by this court after a careful review of all the authorities (which were fully quoted), in the case of *Cavender v. Smith*, 1 Iowa, 307, upon a statute somewhat similar, and equally favorable to the defendant as the one under consideration. The execution law of 1839 required the sheriff to levy upon such part of the estate as the defendant should direct, and in the absence of such direction, the homestead of the defendant in the execution should not be sold, unless a sufficiency of other property could not be found; and in all cases, the real estate of the execution defendant should be exempt from levy and sale until the personal estate of such defendant should be first levied upon and sold, unless such defendant should voluntarily authorize the sale, upon execution, of his real estate.

The case just referred to was an action of right upon a sheriff's deed, involving the homestead of the defendants. Their defense was that the defendant had given no directions or authority to sell the real estate, but that at the time it was done there was a sufficiency of personal property to satisfy the execution, upon which the sheriff had failed to levy or sell, etc. The court held that the foregoing provisions of the statute were only directory to, and not inhibitory upon, the officer authorized to sell, so far as the rights of purchasers at such sales are concerned. And they laid down the rule that in an action of right, where the plaintiff claims under a sheriff's deed, made under the statute just referred to, the deed, if the officer had the power to make the sale, cannot be assailed by showing that the defendant in the execution, at the time of the levy, had other real estate and personal property; or that the property sold was the homestead of the defendant, and that he gave no directions to levy upon the property. If the officer failed to do his duty, the purchaser's title cannot be affected by the omission on the part of the officer, but such questions are and must be between the execution defendant and the officer making the sale.

The general principle, in all such cases, is very well stated in the case of *United States v. Arredondo*, 6 Pet. 729. "Where

power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion, within the power and authority confirmed. The only questions that can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made, or the act done, by the tribunal or the officer," etc. The same general doctrine is laid down in *Voorhees v. Bank of United States*, 10 Pet. 449; *Thompson v. Tolmie*, 2 Id. 157; *Blaine v. Ship Charles Carter*, 4 Cranch, 328; and a number of state authorities, as will be seen by reference to the case first above cited; the object being to give the greatest stability to and security in judicial sales.

This cause is remanded and reversed.

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HOMESTEADS, EXEMPTION OF, FROM FORCED SALE: See *Ackley v. Chamberlain*, 76 Am. Dec. 516, note 518.

THE PRINCIPAL CASE IS CITED to the point that homestead claimants, if they have notice of the sale of the homestead, and make no objection thereto, are estopped afterwards to claim that other property should have been first exhausted: *Foley v. Cooper*, 43 Id. 379. It is also cited to the point that where a judgment is recovered upon a judgment, the latter is merged in the former, and all of its liens or priorities are released: *Gould v. Hayden*, 63 Ind. 450; and that it is immaterial as between the parties whether the interest of the judgment debtor appears of record or not: *Lathrop v. Brown*, 23 Iowa, 49.

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## BREED v. CONLEY.

[14 IOWA, 269.]

INDEX ENTRY OF DEED DESCRIBING LAND CONVEYED AS IN DIFFERENT SECTION, township, and range from those of the deed, and containing the words "for description, see record," is not constructive notice of such deed to subsequent purchaser.

ACTION of right. Both parties claimed under Orr; the defendant, Conley, under a deed from Orr, which was improperly indexed by the recorder, and the plaintiff under a sheriff's deed of the two tracts of land sold as the property of Orr under an execution issued on a judgment rendered some months after the recording of the deed to the defendant. In other

respects the opinion states the case. Judgment for the defendant, and appeal by the plaintiff.

*Thomas Corbett*, for the appellant.

*I. M. Preston and Son*, for the appellee.

By Court, **LOWE, J.** Action of right, founded upon a sheriff's deed, to recover the west half of the southeast quarter and the southeast quarter of the southeast quarter of section 1, township 86 north, of range five west, of the fifth principal meridian, situated in the county of Linn. The answer simply denied the averments of the petition. The issue thus made was tried by the court, who found for the defendant, and after overruling a motion for a new trial, rendered a judgment for the premises and costs of suit.

The evidence and title papers of the parties were all embodied in a bill of exceptions, and exhibit, among other things, the following facts: That the parties both claimed title under Thomas Orr, the defendant in the execution, and presented deeds unexceptionable in form; that the date, as well as the recording of the defendant's deed, was prior in point of time to the date of the judgment under which the plaintiff claimed; that at the time of the plaintiff's purchase the land in controversy was unoccupied; nor did he have any actual notice of defendant's purchase. The only point in controversy is, whether the defective indexing of defendant's deed did or did not impart constructive notice to a subsequent purchaser. The bill of exceptions shows that the deed was indexed as follows: "Thomas Orr to Timothy Conley; date of filing, January 8, 1859; date of instrument, January 8, 1859; recorded in book Q, on page 238; description, S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  section 30, and part of section 13 (for description, see record), T. 83, R. 8." The evidence showed that the deed was in fact recorded in book P, on pages 548 and 549.

It will be observed that the two tracts of land in controversy are both situated in section 1, township 86, range 5 west; whereas the recorder has described in the index or entry-book the land in the defendant's deed as being in two other and different sections, to wit, sections 30 and 13, both in township 83, range 8 west, not corresponding with the first, either in section, township, or range. It is true, the recorder fails to state in what part of section 13 one of the tracts is situated, and refers to the recorded deed for this part of the description; but the searcher for encumbrances could have no occasion to examine

the record when the index showed that neither the section, township, nor range answered to the tracts concerning which he wanted information. Such a description of land in the entry-book is quite too defective and wanting in accuracy to impart constructive notice to a subsequent purchaser or mortgagee; nor is there enough in it to put a reasonably cautious man upon inquiry. Indeed, this case falls fairly within the reasoning and rule laid down in the case of *Scoles v. Wilsey*, 11 Iowa, 261. Following the precedent there set, we must reverse and remand this cause.

Reversed.

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RECORD IN WHICH DESCRIPTION OF LAND CONVEYED BY DEED IS OMITTED does not impart constructive notice to *bona fide* purchaser: *Chamberlain v. Bell*, 68 Am. Dec. 260, and note 262. The index constitutes no part of the record, under the Vermont statutes; and a mortgage, of the record of which there is no index, is an encumbrance, as to subsequent purchasers, from the time of transcribing it upon the record: *Curtis v. Lyman*, 58 Am. Dec. 174, and see note 178. The principal case is cited to the point that the extent of notice imparted by the record of a mortgage is limited to the property described in the index of the record: *Stewart v. Huff*, 19 Iowa, 561.

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## LAY v. GIBBONS.

[14 IOWA, 377.]

**SALE IN LUMP OF SEVERAL DISTINCT PARCELS OF LAND, COVERED BY ONE MORTGAGE**, upon foreclosure, is ground for setting aside the sale, and ordering a resale.

**HOMESTEAD OF MORTGAGOR, EMBRACED IN MORTGAGE WITH OTHER DISTINCT TRACTS OF LAND**, should not be sold on foreclosure except to supply the deficiency remaining after selling the other tracts.

**BILL to quiet title.** Gibbons and wife executed a mortgage to complainant Lay, which covered three distinct tracts of land, one of which was the homestead of the mortgagors. Afterwards Gibbons alone made two other mortgages to other mortgagees. Complainant filed his bill of foreclosure, making Gibbons and wife respondents, the latter of whom, was, however, not served. Decree was entered by consent against Gibbons, and a special execution issued, under which the lands were sold "in lump" to the complainant for about one third of their value. This bill to quiet title the complainant now files against Gibbons and wife, and the subsequent mortgagees. The cause was heard on bill, answers, cross-bills and answers thereto, and upon certain admitted facts; and a decree was

entered ordering a resale of the premises, the proceeds to be applied first to the payment of the complainant's demand, and then to the junior mortgagees according to their priorities, and directing the sale of the homestead only after the remaining mortgaged property was exhausted. Complainant appeals.

*Griffith and Knight*, for the appellant.

*Wiltse and Blatchley, and O'Neil and McNulty*, for the appellees.

By Court, WRIGHT, J. Whether the subsequent mortgagors were necessary parties to the bill of complainant to foreclose; whether such foreclosure and sale barred them of all right to redeem; whether the execution of the mortgage by the wife cut off all claim, on her part, of dower or other interest in the land; whether she, not being a party to the original action, could to this plead usury, the homestead exemption, or other like defenses;—we say whatever answer might be given to these and other important questions raised by counsel, we should still feel constrained to affirm this decree.

It will be observed that the court set aside the sale under the special execution and ordered the premises to be re-exposed, and from the proceeds complainant is to be first paid his entire demand (as also the costs of foreclosure), the surplus, if any, going to the junior mortgagees. And the complainant having asked the court to quiet his title, and respondents by their cross-bills having prayed affirmative relief, it was entirely competent for the court to order such resale, for two reasons: 1. The property was sold "in a lump," and not in parcels: *Boyd v. Ellis*, 11 Iowa, 97, and the cases there cited; *Singleton v. Scott*, Id. 589; *Grapengether v. Fejervary*, 9 Id. 163 [74 Am. Dec. 336]; *Bradford v. Limpus*, 13 Id. 424; 2. A portion of the property sold was the homestead of the mortgagors, and as such it should not, in the language of the law, have been sold, "except to supply the deficiency remaining after exhausting the other property of the debtor, which is (was) liable to execution": Revision of 1860, sec. 2281. Whether complainant's title would have been vitiated for this reason, in an action of right or any collateral proceeding, we need not, of course, determine. As the record stands (under the cross-bill), this is a direct proceeding to set aside the sale. And that the court did not err in ordering a resale, under the circumstances, is to our minds quite clear.

**Affirmed.**

**MORTGAGED PREMISES SHOULD BE SOLD IN PARCELS**, when this can be done, unless it is shown that a sale in one parcel will be more advantageous: *Grapengether v. Fejervary*, 74 Am. Dec. 336, and note 342; *Gillespie v. Smith*, ante, p. 328, and note. The principal case is cited to the point that a sheriff's sale of several tracts of land together, and not in parcels, will be set aside on motion or by proceedings in equity for that purpose: *White v. Watts*, 18 Iowa, 76; *Penn v. Clemans*, 19 Id. 379; *Williams v. Allison*, 33 Id. 289; and also to the point that when a homestead is embraced with other lands in a mortgage, such other lands shall be exhausted before resort is had to the homestead: *Dunn v. Buckley*, 56 Wis. 192.

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## SHARP v. BAILEY.

[14 IOWA, 287.]

**DEED SIGNED BY HUSBAND AND WIFE WILL NOT CONVEY HOMESTEAD**, where wife does not join in granting part, but only in the *in testimonium* part, where she joins to release dower. In legal effect it amounts to no more than a deed by the husband, and a relinquishment of dower by the wife in a separate instrument.

**NO OPERATIVE CONVEYANCE OR EFFECTUAL RELEASE OF HOMESTEAD EXEMPTION** can be made unless the mode pointed out by the statute is pursued with reasonable strictness.

**DEED MUST CONTAIN OPERATIVE WORDS OF CONVEYANCE.**

**CONVEYANCES BY WIFE SHOULD BE STRICTLY CONSTRUED TO PROTECT HER RIGHT.**

ACTION of right to recover lands to which plaintiff claimed title by purchase at a sale under a trust deed thereof. At the time of the execution of the trust deed, the lands in question were the homestead of the defendant. The deed was in form substantially as follows: For the purpose of securing to Solomon L. Sharp the sum of, etc., I, Joseph C. Bailey, do hereby sell and convey, etc., and if said sums are not promptly paid, then I hereby authorize, etc. In witness whereof, the said Joseph C. Bailey with —, his wife, who relinquishes dower, have hereunto set their hands this 22d of June, 1857. Signed, Joseph C. Bailey, Laura H. Bailey. The parties acknowledged the signing of the deed "to be their voluntary act and deed for the purposes therein mentioned." Judgment for the defendant, and appeal by the plaintiff.

*McHenry*, for the appellant.

*Bates and Cole*, for the appellee.

By Court, WRIGHT, J. The question made is, whether under this deed of trust there was such a concurrence in and signing of the instrument by the wife as to make it valid to



pass the title of the owner to the homestead. The language of the statute is (Code, sec. 1247): "A conveyance by such owner is of no validity, unless the husband and wife (if the owner is married) concur in and sign such conveyance." It will be observed that the wife does not join in the granting part of the deed. The grant is by the husband alone. Her name does not appear even in what is technically termed the *in testimonium* part of the deed. But without giving any weight to such omission, we remark, that she apparently joins in this part of the deed to release dower, and for no other purpose.

The case differs in its facts from that of *Grapengether v. Fejervary*, 9 Iowa, 163 [74 Am. Dec. 336], in that there the wife held the property in her own right, and joined with the husband in the granting part of the deed, as well as all others, including the covenant of warranty. The last paragraph, however, was as follows: "And the said Fredericka Zierdt hereby relinquishes all of her right of dower in said premises." Under this deed, it was held that such concluding words did not limit the estate conveyed by her to a dower interest only; that she had, in the granting part of the deed, conveyed all her interest in the premises, and she had no dower right to convey or relinquish.

In *Shaffner v. Grutzmacher*, 6 Iowa, 137, the form of the deed was: "We, Michael Riley, and Sarah, his wife, do convey," etc., and at the conclusion, "the said Sarah Riley hereby relinquishes her right of dower to the premises hereinbefore conveyed." It was held, treating the property as belonging to the husband, that she only released her dower. In *Westfall v. Lee*, 7 Id. 12, the wife joined in the body of the deed, but did not expressly relinquish her right of dower; nor did it appear that she acknowledged the same before an officer authorized thereto. It was held that she was not bound by the covenants; that as the transaction was wholly one of the husband's, the practice was, even when she afterwards made an express relinquishment, to regard her as joining only for the purpose of releasing her dower. And see *Lyon v. Metcalf*, 12 Id. 93.

By the case of *Larson v. Reynolds*, 13 Iowa, 579, it is held that the right of the wife to the homestead differs from that of dower, and that the provisions of the statute as to its conveyance or encumbrance are also different, and that while a similar deed may convey the one as well as the other, such

difference arises necessarily from the rights and privileges possessed by the wife during and after the life of the husband. And this view accords with the rulings made in *Floyd v. Mosier*, 1 Iowa, 512; *Dickson v. Chorn*, 6 Id. 19 [71 Am. Dec. 382]; and *Babcock v. Hoey*, 11 Id. 375.

In *Taylor v. Hargous*, 4 Cal. 268 [60 Am. Dec. 606], it is held that, "as soon as a place, by the occupancy in good faith, of the family, acquires the character of a homestead, the nature of the estate becomes changed, without reference to the manner in which the title to the property originated, whether it was the separate estate of either husband or wife, or the common property of both. It is turned into a sort of joint tenancy, with the right of survivorship, at least as between husband and wife, and this estate cannot be altered or destroyed, except by the concurrence of both, in the manner provided by law.

In the light of these authorities and the statute, did the wife so concur in this deed as to make it a valid conveyance of the homestead? If the subject of the conveyance was her separate property, it seems to us that there could be no fair ground for claiming that she had parted with it by such a deed. The most that could be claimed for it would be that she had relinquished any claim of dower, and it would be extending the fair meaning of the language used unwarrantably to hold that she thereby parted with or conveyed any other or greater interest. If so, why is not the line of argument legitimate which holds that as her interest in the homestead is different from a dower right, the relinquishment of the latter should not indicate that she concurred in the conveyance of the former. And when it is said that her interest in the homestead is different from that of dower, it is not meant that it is less. Its exact nature or character it is difficult to precisely define and limit. But that it is a higher interest is conclusively shown by the fact that while the husband may by deed convey his own interest in any other lands, without the concurrence of his wife, he cannot do so in the homestead. And when we add to this the fact that if the wife survives the husband she may continue to possess and occupy the whole homestead, that subject to the rights of the survivor it may be devised like other real estate, and that if there is no survivor it descends to the issue of either, according to the general rules of descent, all doubt upon the subject would seem to be removed. Being a higher

or greater interest, therefore, to relinquish dower, is not a concurrence in the sale of the homestead.

It must be borne in mind that this homestead right is peculiarly favored, and that as a general rule there can be no operative conveyance, or an effectual release of the exemption, unless the mode pointed out by the statute is pursued with reasonable strictness: *Vanzant v. Vanzant*, 23 Ill. 536; *Dorsey v. McFarland*, 7 Cal. 342. Not only so, but another principle obtains and is applicable, that a deed must contain operative words sufficient to convey the interest of the person conveying it, otherwise the title will not pass. Add to this the further consideration that conveyances by the wife should be strictly construed to protect her right, and it seems to us that to hold that by this deed she concurred or joined in the conveyance of the homestead would improperly extend the true and fair meaning of the language used. It in legal effect amounts to no more than a deed by the husband, and a relinquishment of dower by the wife in separate instrument.

When it is said, in *Larson v. Reynolds*, 13 Iowa, 579, that a similar deed may convey the one interest as well as the other, no more is meant than that a deed of the homestead will include the dower interest therein, and that no distinct relinquishment of dower is necessary.

Affirmed.

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CONVEYANCE OF HOMESTEAD: See *Best v. Allen*, ante, p. 338; *Brewer v. Wall*, 76 Am. Dec. 76, and note 80, citing prior cases; note to *Poole v. Gerrard*, 65 Id. 482-489; see also *Grapengether v. Fejervary*, 74 Id. 336, note 342. The principal case is cited to the point that if the name of the wife does not appear in the body of the conveyance, though it is signed to it and the acknowledgment recites the execution by her of the deed and the relinquishment of her dower, such conveyance, nevertheless, does not operate to pass her estate: *Heaton v. Fryberger*, 38 Iowa, 193; so, if her name fails to appear in the granting clause of the mortgage of the homestead: *Edgell v. Hagena*, 53 Id. 226; *Wilson v. Christopherson*, Id. 483. A deed conveying the homestead, executed by the husband, who signed both his own and his wife's name thereto, will not be treated as the deed of the wife, upon evidence showing that the husband frequently executed deeds conveying real estate in that manner, with the acquiescence of the wife: *Morris v. Sargent*, 18 Id. 100, citing the principal case. But a deed in which the wife joins the husband in the granting clause and in the covenants, operates under the Iowa statutes to pass all the estate of the wife in the property conveyed, including her right of dower: *Edwards v. Sullivan*, 20 Id. 504, citing the principal case.

MISTAKE IN DEED OF MARRIED WOMAN WILL NOT BE RECTIFIED AS AGAINST HER: *Grapengether v. Fejervary*, 74 Am. Dec. 336, note 342.

OPERATIVE WORDS IN DEEDS: See *Gambriel v. Rose*, 44 Am. Dec. 760, note 761; *Cobb v. Hines*, 59 Id. 559.

## CHRISTY v. DYER.

[14 IOWA, 433.]

**HOMESTEAD CHARACTER DOES NOT ATTACH TO PROPERTY UNTIL IT IS ACTUALLY OCCUPIED** as a home; and a mere intention to occupy, though subsequently carried out, is not sufficient.

**LAND PURCHASED WITH DESIGN TO MAKE IT HOMESTEAD IS NOT EXEMPT FROM JUDICIAL SALE** upon a debt contracted after such purchase and before its actual occupancy as a homestead, *semble*.

**DEBT FOR PURCHASE-MONEY OF HOMESTEAD IS NOT DEBT CONTRACTED AFTER PURCHASE** of the homestead, so as to render the property exempt as to such debt.

**WHERE MORTGAGEE INSTITUTES ACTION AT LAW UPON NOTE SECURED**, instead of proceeding to foreclose the mortgage, the judgment is, as between the parties, a lien upon the mortgaged premises from the date of recording the mortgage.

**MORTGAGE EXECUTED TO SECURE PURCHASE-MONEY OF PREMISES AFTERWARDS OCCUPIED AS HOMESTEAD**, need not be signed and concurred in by the wife of the mortgagor.

**ACTION of right.** The defendant had purchased the property in question of the plaintiff, executing at the time a mortgage to the plaintiff to secure the purchase-money, in which his wife did not join. At the time of the purchase he was the head of a family, and designed to make the premises his home, but he did not occupy the same as a homestead until nearly two years after the purchase. After the land was so occupied, the plaintiff obtained a judgment at law against the defendant upon the note given for the purchase-money, and secured by the mortgage, with interest, and an order for a general execution. The execution was levied upon the land, and the plaintiff purchased the same, and received a sheriff's deed; and the plaintiff relies upon this title. The defendant claims a homestead right in forty acres of the tract. Verdict for the defendant as to the homestead tract, and for the plaintiff as to the residue. Plaintiff appeals.

*Bagg and Allen*, for the appellant.

*Monroe*, for the appellee.

By Court, **WRIGHT, J.** The following, among other instructions, was asked by plaintiff and refused: "That if the jury find that the premises in question were not, at the time of the execution of said note and mortgage, occupied and used by said defendant and his family as a homestead, and were not, for the space of two years thereafter, so used and occupied, it is not necessary for the wife of said defendant to join with

him in the execution of the mortgage given to secure the purchase-money to make said conveyance valid, and to divest the said defendant of his right to the exemption of said premises as against the plaintiff; and that plaintiff would be entitled to the possession thereof."

At the request of defendant the following instructions were given: "If the jury believe that, in the suit on which the judgment was obtained, under which the property was sold, there is no reference in any of the proceedings to the mortgage, but that said judgment and execution were general, and that at the time of the rendition of said judgment, defendant was a married man, and with his family, residing upon and using and occupying the same as a homestead, then such premises, including forty acres, were exempt from execution, and that the jury will so find.

"2. If the forty acres claimed by defendant as a homestead was in the occupation of said defendant at the time the judgment was rendered, and the debt on which said execution was obtained was not created prior to the purchase by defendant of said forty acres, then they must find for defendant."

That the homestead character does not attach to property until it is actually occupied and used by the family as a home, is settled in this state as well as in others: *Charless v. Lamber-son*, 1 Iowa, 435 [63 Am. Dec. 457]; *Williams v. Swetland*, 10 Id. 51; *Holden v. Pinney*, 6 Cal. 235; *Wisner v. Farnham*, 2 Mich. 472; *Horn v. Tufts*, 39 N. H. 478; *Walters v. People*, 21 Ill. 178. A mere intention to occupy, though subsequently carried out, does not make the premises the homestead until there is actual residence.

Our law declares that where there is no special declaration of the statute to the contrary, the homestead of every head of a family is exempt from judicial sale. It may, however, be sold on execution for debts contracted prior to the passage of the law, or prior to the purchase of such homestead: Code, secs. 1245, 1249; Revision, secs. 2277, 2281.

If a tract of land is purchased by the head of a family upon which there are no improvements, but which he designs for a homestead, it may admit of some doubt whether the same would be exempt from judicial sale upon a debt contracted after such purchase and before its actual occupancy as a homestead. The spirit and policy of the law would seem to imply the "purchase of the homestead," and not that which might or not be finally made such.

Until such occupancy, the proposed creditor cannot know what it is that may be claimed as exempt. If there is an actual residence, however, he knows that the law gives the exemption. But without now further discussing this view of the case, or expressing more definitely our conclusions thereon, we pass to the consideration of other questions which are decisive of the case before us.

It will be seen that plaintiff claims under a judgment rendered upon a debt, contracted at the time of the purchase of the homestead, or rather that the debt, to satisfy which the property was sold, was a part of the purchase-money.

Plaintiff was the vendor and defendant the vendee of the premises. There are no rights of third persons intervening. Under such circumstances, it is, in our opinion, contrary to the policy of the statute to say that this debt was so contracted after the purchase of the homestead as to render the property exempt.

The legislature, with the view of avoiding all constitutional questions, has made the exemption prospective and not retrospective. When the homestead has been purchased, then, as to all subsequent debts, it is exempt; for all prior ones it is liable.

Is this a subsequent debt? The liability certainly did not arise after such purchase. The agreement to buy, and the corresponding promise to sell, was before the title papers passed. The final obligation to pay arose at the time of finally consummating the contract, when the notes were passed and the deed made. If these shall be treated as concurrent acts, can the claimed exemption be sustained? Upon the soundest principles, we think not.

The claim of defendant is, that the homestead shall not be liable for the money agreed to be paid for its purchase. And yet we are not aware of any case which holds that such claim is to be preferred to that of the vendor for the purchase-money. In this state, it has been expressly held that a subsequent homestead right will not cut off the original claim for the purchase-money: *Barnes v. Gay*, 7 Iowa, 26. In California, it is held that such homestead right is subordinate to the lien for the purchase-money: *McHenry v. Reilly*, 13 Cal. 75.

And in another case, where the husband borrowed money to pay for the homestead, giving a mortgage thereon in his own name, it was held that as the deed of the vendor, and the

mortgage to such third person, were simultaneous acts, the purchaser and wife had neither an equitable nor legal right of homestead: *Lassen v. Vance*, 8 Cal. 271 [68 Am. Dec. 322]. It may well be doubted whether this case is sustained by the authorities in all its parts: See *Stansell v. Roberts*, 13 Ohio, 148 [42 Am. Dec. 193]; *Davis v. Peabody*, 10 Barb. 91. But however this may be, it recognized the rule that the vendor has the paramount lien, and this is sufficient for the purposes of the present case. In *Stone v. Darnell*, 20 Tex. 11, Hemphill, C. J., says: "We have held in repeated cases in favor of the vendor that his vendee, as against him, could not claim the exemption, or be shielded under it from the payment of the purchase-money, and this was on the ground that until such payment, the superior right or title in the land remained in the vendor; that the title, in fact, had not fully vested in the vendee until the discharge of the purchase-money; that the claim of the homestead is based on the fact that the land, as against the vendor, is held by an indefeasible title." And see *Shepherd v. White*, 11 Id. 346, where it is held that "if there was a resulting trust, and the nominal grantee held the land for the use of the real purchaser, the trustee could not acquire, upon the land, a homestead free from and unencumbered by the trust; he could not claim the protection of the homestead law any more than he could if he had been a real purchaser, and taken a deed absolute, but given a mortgage on the land so purchased, to his vendor, to secure the purchase-money." Also *Farmer v. Simpson*, 6 Id. 303.

But it may be said that these cases were decided upon peculiar statutes, and that in most, if not all of them, the proceeding was to foreclose a mortgage or enforce a vendor's lien, while in this case the plaintiff simply took a judgment at law on one of the notes secured by the mortgage. Under our law, does this change the rule?

The statute gives a party the privilege to sue upon the note, instead of proceeding to foreclose the mortgage. In such a case, the mortgaged property may be sold, and the lien of the judgment attaches from the date of recording the mortgage: Code, 1851, secs. 2086, 2087. The case of *Redfield v. Hart*, 12 Iowa, 355, recognizes the rule that before such judgment lien can relate back as to third persons, the property must be described in the same, and a special execution directed to issue. Not so, however, as between the parties. The statute also de-



clares that the vendee shall, for purposes of foreclosure, be treated as a mortgagor of the property purchased, and his rights foreclosed in a similar manner: Revision 1860, sec. 3672. And the case of *Barnes v. Gay*, 7 Iowa, 26, which in principle does not differ from the one before us, expressly holds that the homestead is subordinate to the lien of the vendor.

It is held, therefore, that the deed and mortgage were, at most, but simultaneous acts; that the seisin of the husband was so instantaneous that it was not necessary to the validity of the mortgage that the wife should sign and concur in the same, in order to make it liable for the purchase-money. And further, that as between the parties, the lien of the judgment on the note related back to the recording of the mortgage, and that (aside from any question of redemption) the purchaser took his title, divested of the homestead claim.

Reversed.

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OCCUPATION NECESSARY TO CONSTITUTE HOMESTEAD: *Fogg v. Fogg*, 77 Am. Dec. 715; *Timlinson v. Swinney*, 76 Id. 432; *Franklin v. Coffee*, 70 Id. 292, note 294; note to *Pryor v. Stone*, Id. 347-350. Property owned by the head of a family is not invested with the character of a homestead before it is actually occupied as a home: *Hale v. Heaslip*, 16 Iowa, 452; *Elston v. Robinson*, 23 Id. 211; *Neal v. Coe*, 35 Id. 409, citing the principal case. And a change of homestead by a judgment defendant from one parcel of land to another cannot displace or affect the liens of judgments attached before such change: *Elston v. Robinson*, 21 Id. 534, citing the principal case.

MORTGAGE EXECUTED TO SECURE PURCHASE-MONEY OF HOMESTEAD is valid though executed by the husband alone: See *Lassen v. Vance*, 68 Am. Dec. 322, note 323; *Carr v. Caldwell*, 70 Id. 740, note 742. The principal case is cited to the point that a homestead is not exempt from judicial sale for the satisfaction of a judgment for the purchase-money: *Cole v. Gill*, 14 Iowa, 530; *Burnap v. Cook*, 16 Id. 153; *Hyatt v. Spearman*, 20 Id. 513; *Bills v. Mason*, 42 Id. 333.

JUDGMENT LIENS ATTACH WHEN, AND NATURE AND EXTENT OF: See *Buchan v. Sumner*, 47 Am. Dec. 305, and note 319, citing prior cases. In California the judgment is a lien from the time it is docketed: *Ackley v. Chamberlain*, 76 Id. 516, note 518. A decree of sale on foreclosure operates upon such interest as the mortgagor had in the property at the execution of the mortgage: *Boggs v. Fowler*, Id. 561. The principal case is cited to the point that, as between the parties, a judgment at law upon a note secured by mortgage is a lien from the date of the recording of the mortgage: *State v. Lake*, 17 Iowa, 218; and that the lien of a mortgage may be enforced in an action on the note by an order making the judgment a lien as of the date of the mortgage, and for the enforcement of the judgment against the mortgaged property: *Morrison v. Morrison*, 38 Id. 78. Although, as between judgment creditors and third persons, it is not competent for the judgment creditor to extend the lien of his judgment by proof *aliunde*, yet,

as between the parties to the judgment and their heirs, the rule is different, and the judgment creditor may show that his judgment attaches as a lien although it may not so appear by the record: *Delavan v. Pratt*, 19 Iowa, 432, 433, citing the principal case. And in a contest between the judgment debtor and a purchaser under execution issued upon the judgment, it is competent for the purchaser to show by the pleadings and the record in the action that the judgment attached as a lien upon the property purchased by him, although in form, upon the face of the judgment alone it did not appear to be a lien: *Markham v. Buckingham*, 21 Id. 496, citing the principal case. It is also held, citing the principal case, that the satisfaction of a judgment on notes given for the purchase-money of real estate by a sale under general execution of such real estate, does not operate to discharge the vendor's lien in such manner as to give priority to another judgment against the vendee: *Patterson v. Linder*, 14 Id. 416.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**KANSAS.**

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**HORNE v. STATE.**

[1 KANSAS, 42.]

**ACCUSED IS PRESUMED INNOCENT** until the prosecution establishes his guilt by proof of every material allegation and every ingredient of the crime. He may stand on this presumption, withholding all proof, until the prosecution has made out a complete case.

**TO CONVICT ON CIRCUMSTANTIAL EVIDENCE**, the circumstances must all concur to show that the prisoner committed the crime, and they must all be inconsistent with any other rational conclusion. A few or a multitude of facts proved, all consistent with the supposition of guilt, are not enough to warrant a verdict of guilty.

**ERRONEOUS INSTRUCTION IS NOT CURED** by afterwards embodying in the charge the true rule of law applicable to the point.

**CHARGE THAT ANOTHER AND "DEFENDANT** might both be guilty as principals in this murder," is a mixed one of law and fact, and is erroneous; for while it contains the proper instruction that two persons may be guilty as principals in one crime, it presents the fact that this is murder, without informing the jury that they are the exclusive judges of the facts.

**COURT MAY PRESENT FACTS IN CHARGE**, but must inform the jury that they are the exclusive judges of all questions of facts.

**CHARGE WHICH PRESENTS FACTS**, or suggests a conclusion from facts, without informing the jury that they are the exclusive judges of such facts, is erroneous.

**THE** opinion states the facts.

*Adams, Crozier, and Ludlum, and W. P. Gambell, for the appellant.*

*Thomas P. Fenlon, county attorney, and F. P. Fitzwilliam, for the appellee.*

By Court, KINGMAN, J. At the November term of the district court of Leavenworth County, Carl Horne was indicted and tried for the murder of Philip Friend, and was found guilty of murder in the first degree. From the judgment of the court on that verdict, the accused has brought his case to this court by appeal.

The errors alleged are set forth in the motion made for a new trial in the court below, and are as follows: 1. That the court admitted illegal testimony; 2. Since the trial of this cause, the defendant has discovered new evidence, material to the cause, which he could not with reasonable diligence have discovered before or at said trial; 3. The jury was separated without leave of the court, after retiring to deliberate upon their verdict; 4. The court misdirected the jury in a material matter of law; 5. The court erred in refusing to charge as requested by defendant's counsel; 6. The verdict is contrary to law; 7. The verdict is contrary to law and against the evidence; 8. The court erred in overruling the motion to quash the indictment made in this case.

Exceptions were taken, during the progress of the trial, to the various rulings of the court below, which bring them all before this court for revision.

It is hardly necessary to comment in detail upon the numerous points raised in the record and urged by counsel. It is sufficient to say that after a careful consideration of the various rulings of the court, as shown by the record, we can see no error in them, so far as embraced in the first, second, third, fifth, sixth, seventh, and eighth causes assigned for a new trial.

Among the instructions of the court are the following:—

“If the jury believe, from the evidence, that the facts in the case are all consistent with the supposition that the prisoner is guilty, and he can offer no resistance to that, except the character the prisoner has borne, and except the supposition that no man would be guilty of so atrocious a crime as that laid to the prisoner, they are warranted in returning a verdict of guilty.”

The court further charged “that the woman and this defendant might both be guilty as principals in this murder.”

An examination of the first of these charges will show that it contains a principal of law heretofore unknown. To make out the guilt of a person charged with crime, the prosecution must prove every material allegation, and every ingredient of

the crime. The accused is presumed innocent until this is done, and may stand on this presumption, withholding all proof until the prosecution has made out a complete case.

Take from this instruction the defense which the accused might offer of his previous good character, and the supposition that no man would be guilty of so atrocious a crime as that laid to his charge, and it leaves this proposition:—

That if the jury believe from the evidence that the facts in the case are all consistent with the supposition that the prisoner is guilty, they are warranted in returning a verdict of guilty.

It is obvious that proof of good character, and the supposition that no man would be guilty of so atrocious a crime as murder, cannot unfavorably affect the position of the prisoner. He may well stand on the presumption of innocence, and offer no evidence. Is a jury, then, warranted in returning a verdict of guilty, when the facts in the case are all consistent with the supposition that the prisoner is guilty? If so, a man may first be presumed guilty, and two or three facts proven, consistent with that supposition, and the law will warrant a finding of guilty. Such is not the rule of law.

A few facts, or a multitude of facts, proven, all consistent with the supposition of guilt, are not enough to warrant a verdict of guilty; but in order to convict on circumstantial evidence, it is held necessary, not only that the circumstances all concur to show that the prisoner committed the crime, but that they all be inconsistent with any other rational conclusion: 2 Hale P. C.; 2 Stark. Ev. 521, 522; 3 Greenl. Ev., sec. 137. This being the true rule, it follows that in this proposition the court misdirected the jury.

The counsel for the state, in support of the charge under consideration, read what he claimed as an identical proposition from Wells on Circumstantial Evidence, sec. 161, as follows:—

“If you think that the facts in this case are all consistent with the supposition that the prisoner is guilty, and can offer no resistance to that, except the character the prisoner has borne, and except the supposition that no man would be guilty of so atrocious a crime as that laid to the charge of the prisoner, that cannot much influence your minds.”

So far from this sustaining the charge given, there is nothing in common but the statement of the condition of the case. The conclusions from the same statement are different. The charge

given says that a certain state of facts warrants a finding of guilty, while the authority quoted shows that the same facts being proven, the proof of good character and the presumption that no man would be guilty of so atrocious a crime, cannot much influence the minds of the jury.

It was urged in argument that the court had, in other parts of the charge, given the true rule of law as applicable to this point; but as this was a separate charge, it is impossible for us to say that it was not the controlling one with the jury. We are not insensible to the consideration that the court, having once ably and clearly given the correct law, the probabilities are that little of essential injury may have been sustained by the defendant by this misdirection. But we have no right to consider probabilities in reference to a single case when called upon to apply the general principles of established law, and to register a precedent for the future action of courts. "We perform a single and unmixed duty when we declare upon the call of the accused what are his legal rights."

The second of the charges quoted above is a mixed one of law and fact. The principle of law involved is, that two persons may be guilty as principals in one crime. This is true, and a proper instruction. The fact presented in the charge is, that this was a murder, by the use of the expression "this murder."

The court has a right to present the facts in his charge, but must in that case inform the jury that they are the exclusive judges of all questions of fact: Code C. P., sec. 215. This was not done in this case. The charge, moreover, is not so much the presentation of facts as a conclusion from facts.

The first duty of the jury was to decide whether a murder had been committed. This duty was forestalled by the court by intimating that this was murder. If it be considered as presenting the facts, or suggesting a conclusion from facts, it is equally error. If the first, it is error, because the jury were not informed that they were the exclusive judges of the facts. If the second, it is error, because it was intimating a conclusion from facts, which is the special and exclusive province of the jury.

All persons familiar with the trial of criminal causes have had occasion to observe with what anxiety a jury listens to catch from the court the slightest indication of its views. This is particularly the case when matters of great doubt and

difficulty are before them for decision. How, then, can it be known that the expression used in this charge had not some influence in determining the final result? The more able and upright the court, the more likely are its intimations to have weight; and it is impossible to say that the jury may not have received some bias from the language used. It therefore necessarily follows that there is material error in it.

For the misdirection in these two charges, a new trial should have been awarded the accused on his motion.

The judgment is reversed with costs, the verdict set aside, and the cause remanded to the court below, with instructions to sustain the motion for a new trial.

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PRISONER IS TO BE CONSIDERED INNOCENT until his guilt is proved: *State v. Smith*, 54 Am. Dec. 578, note 582.

CIRCUMSTANTIAL EVIDENCE SHOULD BE SO STRONG as to tend to convince the jury of defendant's guilt, and to exclude every supposition inconsistent therewith, to warrant a conviction in a criminal case: *Sumner v. State*, 36 Am. Dec. 561; *Commonwealth v. Webster*, 52 Id. 711, and note 737. The principal case is distinguished on this point in *State v. Adams*, 20 Kan. 328. It is cited in *State v. Grebe*, 17 Id. 461, to the point that in a case depending entirely on circumstantial evidence the evidence should be such as to exclude every other reasonable hypothesis than that of defendant's guilt.

WHETHER ERRONEOUS INSTRUCTION IS CURED by afterwards embodying the correct one in the same charge, see *Wood v. Chambers*, 70 Am. Dec. 382, and note 384; *Benson v. Atwood*, 71 Id. 611.

INSTRUCTION ASSUMING FACT which should be left to the jury is erroneous: *Tyner v. Stoops*, 71 Am. Dec. 341, and numerous citations in note 348; *Wesley v. State*, 75 Id. 62; *People v. Levison*, 76 Id. 505, note 507. The principal case is distinguished on this point in *State v. Horne*, 9 Kan. 130; *Wiley v. Keokuk*, 6 Id. 105.

BURDEN OF PROOF in criminal cases is on the state, and this burden never changes: *State v. Kuhuke*, 26 Kan. 408, citing the principal case. Erroneous instruction is not cured by giving a correct one subsequently in the same charge, for the jury may have arrived at their conclusion from a consideration of the erroneous one: *State v. Howard*, 14 Id. 175; *Union Pacific R'y Co. v. Milken*, 8 Id. 651, both citing the principal case.

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## STATE v. HITCHCOCK.

[1 KANSAS, 178.]

ACT IS NOT INVALID by reason of its having been approved on a day after the act of Congress admitting Kansas into the Union.

SECTION 17, ARTICLE 2, OF KANSAS CONSTITUTION, providing that, "in all cases where a general law can be made applicable, no special law shall be enacted," recognizes the necessity of some special legislation, and seeks only to limit, not prohibit it. It also leaves to the discretion of the



legislature to determine whether their purpose can or cannot be expediently accomplished by a general law, and no special law will be declared invalid merely because it would, in the opinion of the court, have been possible to frame a general law under which the same purpose could have been accomplished.

**TERRITORIAL OFFICERS, ON ADMISSION OF KANSAS** as a state, became *ad interim* state officers. They could do no act prohibited by the constitution to regulate state officers of like functions, but were not obliged to follow the mode of procedure in the transaction of public business prescribed for the regular officers of the state government.

**TERRITORIAL LEGISLATURE OF KANSAS, BEING IN SESSION** when the act of admission was passed, had power to continue in the discharge of the duties of that department until superseded, according to the mode of procedure prescribed in the organic act, and the laws so passed were valid, provided they were not in conflict with the constitution of the United States or the state.

**CONSTITUTION OF KANSAS DOES NOT REQUIRE** a record to be kept of the presentation of a bill to the governor for approval; but if it did, the fact that such directory provision as to a formal step was not complied with could not affect the validity of the law.

**WHERE GOVERNOR APPROVES BILL**, and the constitution does not require that he should notify either house of the legislature of the fact, or that such notification, if made, should be entered on the journals. The date being no necessary part of the approval, it will be presumed that the bill was signed between the date of its passage and the final adjournment of that session of the legislature.

**MOTION** for a writ of *mandamus*. The opinion contains the facts.

*D. M. Valentine*, for A. Johnson, the relator.

*W. Shannon*, for the respondent.

By Court, EWING, C. J. The writ will not be issued unless the "act to provide for the location of the county seat of Franklin County," which purports to have been approved on the 30th of January, 1861, and is published among the laws of the territorial legislature of that year, be invalid.

That the act is not invalid by reason of its having been approved on a day after the act of Congress admitting Kansas into the Union, was, in effect, decided by this court in the case of *State ex rel. Hunt v. Meadows*, 1 Kan. 90, to which decision we adhere.

Nor is it invalid as in conflict with section 17, article 2, of the state constitution, which provides that "in all cases where a general law can be made applicable, no special law shall be enacted."

We understand this section of the constitution as leaving a discretion to the legislature, for it would be difficult to imagine

a legislative purpose which could not be accomplished under a general law. If it be possible, as we think it is, to frame a general law under which the purpose of any special law could be accomplished, then that provision of the constitution, if literally construed, would absolutely prohibit all special legislation. Such is not its purpose. It recognizes the necessity of some special legislation, and seeks only to limit, not prohibit it.

There are many special acts to be done, undone, prevented, or omitted, in which the legislature could not give effect to their will through a general law without accomplishing more evil than good. For instance, there might be strong reasons, arising from change of county lines or other causes for the passage of a law, such as the one in question, authorizing an election in a particular county to change the county seat, and yet there might be no circumstances existing or likely to arise in any other than that one county, making such election expedient. Such a general law could "be made applicable" to the election in the county where it was necessary and expedient, but such law would bring on distracting contests in many other counties, and make the general effect of the law highly injurious. It is not the purpose of the constitution to compel the legislature to accomplish an act of local or special legislation beneficial to one person or locality only, through a general law, which might, in their opinion, result in damage when applied to other persons or localities. The legislature must judge and determine whether the object in view can be accomplished under a general law without public injury, and if it can be, they are not at liberty to seek it by enacting a special law. But if it cannot, without such public injury, then they may resort to special legislation. Any other interpretation of their duties would, in effect, prohibit special legislation, and compel the legislature to accomplish a special purpose under a general law, oftentimes to the injury of the public, thus sacrificing the spirit to the letter of the constitution.

The legislature must necessarily determine whether their purpose can or cannot be expediently accomplished by a general law. Their discretion and sense of duty are the chief, if not the only, securities of the public for an intelligent compliance with that provision of the constitution. Whether we could, in any conceivable case, presenting a flagrant abuse of that discretion, hold a private law invalid as contrary to that provision of the constitution, we need not here decide; but we

would certainly not hold such a law invalid merely because it would, in our opinion, have been possible to frame a general law under which the same purpose could have been accomplished.

The case of *Thomas v. Board of Commissioners etc.*, 5 Ind. 4, considering it, as did the supreme court of Indiana, as involving only a construction of section 23 of the constitution of that state, presents a case very similar as to law and fact, and quite as strong for this relator as the one at bar. We are not convinced by the reasoning, nor satisfied with the conclusion, of that authority, which is the only one cited on either side upon the question.

Nor is this law invalid because it originated in the council of the territorial legislature.

The schedule to the constitution provided that all officers under the territorial government should continue in the exercise of the duties of their respective departments until superseded under the authority of the constitution. All officers of the old government on the admission of the state became, *ad interim*, state officers. They could do no act prohibited by the constitution to regular state officers of like functions, but were not obliged to follow the mode of procedure in the transaction of public business prescribed for the regular officers of the state government. The machinery of the various branches of the territorial government was, in many respects, different from that arranged in the constitution for conducting public business, and could not have been changed on the admission of the state without a suspension and derangement of public business, to prevent which was a chief purpose of the schedule. The territorial legislature, being in session when the act of admission was passed, had the power to continue in the discharge of the duties of that department until superseded, according to the mode of procedure prescribed in the organic act, or the laws of the territory, and the laws so passed, if their provisions were not in conflict with the constitution of the United States or of the state, were valid.

It is alleged, in the motion for the writ, that the law in question, which, as published and as enrolled, appears to have been approved by the governor on the 30th of January, was, in fact, not passed by the legislature until the 31st of that month. And while the genuineness of the signature of the governor is not questioned, an attempt is made to show that the signature was not affixed to the bill before the adjourn-

ment, by a production of the journals of both houses, which, it is alleged, contain no evidence of the presentation of the bill, or of notice from the governor of its approval.

Without considering whether any evidence whatever would be admissible to impeach a law enrolled and attested by the genuine signatures of the proper officers, we need only say that no facts are alleged in this case, which, if apparent on the face of the law itself, would at all affect its validity. The organic act required no record to be kept of the presentation of a bill to the governor for approval, and if it did, the fact that such directory provision as to a formal step was not complied with, could not affect the validity of the law. So, where the governor approved a bill, there was no requirement that he should notify either house of the fact; or that such notification, if made, should be entered on the journals. And admitting the fact, and receiving it as evidence that the law was passed a day before it purports to have been signed, the utmost effect of the evidence would be to establish an error in the date of the governor's approval, and leave the approval as if it had not been dated. In such case, as the date is no necessary part of the approval, and as the presumption is in favor of the regularity of official acts, the law would be treated as having been signed between the date of its passage and the final adjournment of the legislature on the 2d of February.

The motion is overruled.

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IT IS WITHIN DISCRETION of the legislature to determine whether or not a general law can be made applicable, and the decision there made is final and conclusive: *McGill v. State*, 34 Ohio St. 247; *State v. County Court of Boone*, 50 Mo. 323. And the mere fact that certain results could be accomplished by a general law does not necessarily avoid a special law passed to effect them: *Beach v. Leahy*, 11 Kan. 26; *Francis v. A. T. & S. F. R. R. Co.*, 19 Id. 306; *Comm'rs of Norton Co. v. Shoemaker*, 27 Id. 79; *Gray v. Crockett*, 30 Id. 143; *Knowles v. Board of Education*, 33 Id. 699, all citing the principal case. All laws passed by the Kansas territorial legislature, until superseded according to the mode prescribed by law, were valid, if their provisions were not in conflict with the constitution of the United States or of the state: *State v. Stormont*, 24 Id. 692, citing the principal case.

ELIGIBILITY OF OFFICER elected under territorial law: See *Parker v. Smith*, 74 Am. Dec. 749, and note 753.

## MUNN v. TAULMAN.

[1 KANSAS, 254.]

**IF ANY OF SEVERAL GROUNDS OF DEFENSE** set up in answer is good, it is error to sustain a general demurrer thereto, on the ground that it does not set forth any defense to the action.

**PHRASE "HE SAYS THAT HE DENIES,"** in an answer, is equivalent to phrase "he denies," under the Kansas code.

**OBJECT OF ANSWER IS TO APPRISE PLAINTIFF** what defense is intended to be set up in bar of his claim. This is all the law requires.

**THAT SEVERAL GROUNDS OF DEFENSE** are inconsistent is not a defect that can be taken advantage of by demurrer. The usual and proper course is to compel the party to elect on which of the inconsistent grounds he will rely.

**THE** opinion states the facts.

*S. D. Lecompte*, for the plaintiff in error.

*S. A. Stinson*, for the defendant in error.

By Court, KINGMAN, J. This cause comes up on error from the district court for Leavenworth County.

The only question is, whether the court erred in sustaining the demurrer to the answer.

The answer sets forth three grounds of defense, and the demurrer is general, that the answer does not set forth any defense to the action.

If any of the grounds of defense are good, then the court erred in sustaining the demurrer. Plaintiff in error very candidly admits that the third clause of the answer constitutes no defense to the action. We think he is right, and also that the second clause is equally defective.

This leaves the first ground of defense set forth in the answer for consideration. It is as follows:—

"And now comes the said Alvah Munn, the above-named defendant, by Lecompte, Mathias, and Burns, his attorneys, and for answer to the petition of the said plaintiff, filed in the above cause, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that he denies each and every allegation in plaintiff's petition alleged against him, and of this he puts himself upon the country."

The only objection urged to this is the use of the language, "he says that he denies," instead of "he denies."

It is insisted by defendant in error that the court must take into consideration that the code was framed with reference to

the verification of pleadings, and that the phrase "says he denies" would not have subjected the maker of the affidavit to answer to the penalties of perjury, were statements of the answer known by affiant to be false.

We admit the principle of construction, but deny the application.

To say that he denies, is to deny; and had it been written, "because he denies," he would have denied by saying so on paper, and he has done no more than declare that he does what it would otherwise be obvious that he had done.

In Ohio, it has been decided that an objection to a defective general denial must be made by motion, and cannot, in general, be taken by demurrer: *Sevan's Pleading and Practice*, 245, 253.

We do not think it necessary to affirm that in this case the second section of the code has laid down the principles of its interpretation.

After having given the code a name, the legislature hastened to declare that its provisions and all proceedings under it shall be liberally construed with a view to promote its object, and assist the parties in obtaining justice.

The object of an answer is to apprise the plaintiff what defense is intended to be set up in bar of his claim. This is clearly and manifestly done in this case, and this is all the law requires.

It is urged by defendant in error that the several grounds of defense are inconsistent. If so, it is not a defect that can be taken advantage of by demurrer. The usual and proper course is to compel the party to elect on which of the inconsistent grounds he will rely for a defense.

The judgment is reversed, and the case is remanded to the district court of Leavenworth County, with directions to overrule the demurrer, and for further proceedings.

Judgment is rendered against defendant in error for costs in this court.

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IF ANY ONE COUNT IN DECLARATION is good, a demurrer to the whole declaration must be overruled, though the other counts are bad: *United States v. White*, 37 Am. Dec. 374; *Biddle v. Coryell*, 38 Id. 521; *Lane v. Levillian*, 37 Id. 769; *Freeland v. McCullough*, 43 Id. 685; *Tinsman v. Belvidere etc. R. R. Co.*, 64 Id. 416.

IMPROPER BLENDING OF SEVERAL CAUSES OF ACTION may be cured by a motion to compel an election: *Mooney v. Kennett*, 61 Am. Dec. 576, note 580.

**GOLDEN v. COCKRIL.**

[1 KANSAS, 259.]

**CHATTEL MORTGAGE MAY BE VOID** for uncertainty as well as a mortgage of real estate.

**INSTANCES OF SUFFICIENT AND INSUFFICIENT** description of chattels in mortgage thereof given, and general principle deduced that any description which will enable third persons to identify the property, aided by inquiries which the mortgage indicates and directs, is sufficient.

**DESCRIPTION OF PROPERTY IN CHATTEL MORTGAGE** as "124 head of mules, now in the territory of Kansas" and "one pair of claybank horses," is not sufficient.

**DELIVERY OF CHATTELS EITHER ACTUAL OR CONSTRUCTIVE**, is essential to the validity of a mortgage thereof, as against third parties. Registration dispenses with delivery.

**CHATTEL MORTGAGE OF PROPERTY** situated in Kansas, executed and recorded in another state, where the mortgagor resides, without any change of possession, is not notice to nor valid as against attaching creditors of the mortgagor in the former state.

**THE** opinion contains the facts.

By Court, BAILEY, J. Petition in error from first district court for Leavenworth County.

From the bill of exceptions the following facts appear, viz:—

On the eighth day of October, 1859, C. A. Perry, of Platte County, Missouri, executed to Clinton Cockril, of the same county, a chattel mortgage upon "124 head of mules and one pair of claybank horses," with other personal property, to secure the payment of a debt due from said Perry to said Cockril, which mortgage was duly recorded in said county of Platte according to the laws of Missouri.

On the eighteenth day of October, 1859, nineteen mules and one yellow pony, a part of the property so mortgaged to Cockril, was attached in Leavenworth County, Kansas, at the suit of Thomas C. Anderson, by D. R. Hook, deputy and under sheriff of J. W. H. Golden, sheriff of said county of Leavenworth.

Some time in September, previous to the attachment, the mules and pony attached had been left by Perry, after their return from Salt Lake, in charge of H. C. Branch of Leavenworth County, and a contract had been entered into between Perry and Branch for wintering them. They remained in Branch's custody under this arrangement until they were attached, and Branch had received no notice of any change in the ownership.

The mortgage from Perry to Cockril was made in good faith



to secure the payment of a just debt of large amount, and was executed and recorded in all respects according to the requirements of the Missouri statutes.

In November, 1859, following the attachment of the mortgaged property, Cockril, the mortgagee (now defendant in error), commenced suit in Leavenworth County, Kansas, against the sheriff Golden, his deputy, Hook, and the attaching creditor, Anderson, to recover possession of the property attached, and on the eleventh day of November, 1859, the nineteen mules and one yellow pony were taken out of the sheriff's custody, on an order of replevin, and delivered up to Cockril.

At the trial of the issue joined in this suit of replevin at the May term of the district court for Leavenworth County, 1862, counsel for Cockril offered in evidence to the jury the mortgage executed and recorded in Missouri, to which the counsel for defendants (now plaintiffs in error) objected, but their objections were overruled by the court, and the ruling excepted to.

The plaintiff Cockril was then sworn as a witness, and testified that the property in dispute was a portion of the property included in the mortgage; that said property, at the time of the execution of the mortgage, was in Kansas, and there remained; that he did not receive the property at the time he took the mortgage, and never had it in his possession, etc. All of which was confirmed by the testimony of Perry.

Defendants' counsel then moved the court to instruct the jury, as matter of law, as follows, to wit: 1. If the jury believe from the evidence that at the time the mortgage was executed in Platte County, Missouri, the property was in Leavenworth County, Kansas, that possession was not delivered to the plaintiff, and that the property was retained in the possession of Charles A. Perry, or Charles A. Perry & Co., in this county, either by themselves or their agents, and was so in their possession at the time it was seized under the order of attachment, then they must find for the defendants; 2. That if, by the terms of the mortgage, the property was delivered, or was to be delivered to plaintiff, and if the jury believe from the evidence that the mortgagor, Perry, retained possession of the property, and treated it as his own, then such acts were inconsistent with and contrary to the terms of the mortgage, and rendered it absolutely void as to creditors; 3. "That a mortgage executed in Missouri upon personal property in Kansas,

at the time, and which remains there, and is taken under an order of attachment against the mortgagor in favor of his creditors, will not hold the property as against such attaching creditors, unless possession of the property was given to the mortgagee, Cockril, and was retained by him"; 4. That the defendant, Anderson, had a right, under his attachment, to seize the mortgaged property, and that the purchaser at the sale would get whatever interest C. A. Perry, or C. A. Perry & Co., had in the property, subject to claims of the alleged mortgagee.

All of which instructions the court refused to give to the jury, and the refusal to charge was excepted to by defendants' counsel, but charged them, in substance, as follows, viz.: "That personal property followed the domicile of the owner, and that a conveyance by it or contract in relation to it was good by the law, if the domicile was good anywhere; that under the Missouri statute of fraudulent conveyances, possession of personal property need not be delivered to the mortgagee to make the conveyance valid, if the mortgage was acknowledged or proved, and recorded in the county in which the mortgagor resided at the time of its execution, as the statute directs; and that if they were satisfied from the evidence that Perry had executed and delivered to Cockril a mortgage in good faith upon the property in question, to secure a *bona fide* indebtedness by C. A. Perry & Co., or C. A. Perry, which indebtedness was unsatisfied at the time of bringing this action, and that that mortgage was acknowledged or proved, and recorded in the county of the mortgagor, as conveyances of land are required by such Missouri statute, and that such conveyance antedated the attachment suit of Anderson, etc., then the lien of plaintiff was anterior and better than the defendants', and they should find for the plaintiff."

The jury, under these instructions of the court, found a verdict for the plaintiff, Cockril, assessing his damages for the taking of the property at one cent. Whereupon the defendants' counsel moved to set aside the verdict and for a new trial, on the ground of misdirections to the jury, and refusal to charge, as requested. Which motion was overruled. Whereupon the defendants bring their petition in error upon bill of exceptions filed in this court.

The petition in error sets forth six distinct errors, to wit: 1. The court erred in the instructions given to the jury on the trial; 2. In refusing to give to the jury the instructions which

the said plaintiffs in error prayed the court to give; 3. The facts set forth in the petition are not sufficient to maintain the aforesaid action against the plaintiffs in error; 4. The court erred in allowing the mortgage from C. A. Perry to Cockril to be read in evidence to the jury against the objections of the plaintiffs in error; 5. The court erred in overruling the motion made by the plaintiffs in error for a new trial; 6. That said judgment was given for the said defendant in error, Clinton Cockril, where it should have been given for said plaintiffs in error, according to the law of the land.

From this statement of facts it will be readily seen that the only question presented for decision is, whether this mortgage from Perry to Cockril, executed in Missouri, in accordance with the statutory requirements of that state, is operative to create a lien upon the property in Kansas, valid against a subsequent attachment, sued out by creditors of Perry, in pursuance of the laws of Kansas.

While it seems to be conceded that the mortgage was made with the *bona fide* intention of securing the debt specified in the condition thereof, its validity is impeached upon the following grounds:—

1. That it was inoperative and void as to the property in dispute, from the loose, vague, and indefinite description of the chattels intended to be conveyed by it.

As to the degree of certainty and exactness of description requisite in a chattel mortgage, the authorities seem to be somewhat at variance, though all concur in holding that such a mortgage may be void for uncertainty as well as a mortgage of real estate.

In the case of *Bullock v. Williams*, 16 Pick. 33, Chief Justice Shaw remarks that “the articles mortgaged must be of such a nature and so situated as to be capable of being specifically designated and identified by written description.”

In Canada, the statute provides (20 Vict., c. 3, sec. 4) that “a mortgage of chattels shall contain such efficient and full description thereof that the same may be thereby readily and easily known and distinguished.”

And in the case of *Rose v. Scott*, 17 U. C. Q. B. 385, the court of queen’s bench of Upper Canada had occasion to apply these provisions of the statute to a chattel mortgage containing the following description, to wit:—

“Seven horses, three lumber wagons, one carriage, one pleasure sleigh, all the household furniture in possession of the

party of the first part, and being in his dwelling-house; all the lumber and logs in and about the saw-mill and premises of the said grantor; all the blacksmith tools now in the possession of the said party of the first part, six cows and four stoves."

The court held that nothing but the furniture, lumber, and logs could pass by the mortgage, as none of the other articles were described in such a way as to enable a person to ascertain their identity by inspection or inquiry, and distinguish them from other similar articles.

In the case of *Montgomery v. Wight*, 8 Mich. 143, the description being "one sorrel horse," the supreme court of Michigan thought the description insufficient to pass the property under this Canadian statute,—the object of which, it was said, was to "prevent creditors and purchasers from being deceived by ambiguous descriptions, the allowance of which would encourage fraud, and render it easy to substitute one chattel for another." The court added, that "any hint which would have directed the attention of those reading the mortgage to any source of information beyond the word of the parties to it would, at least, have been much more satisfactory. As this horse had a name, that would have furnished a ready description:" *Montgomery v. Wight, supra*.

In the case of *Lawrence v. Evarts*, 7 Ohio St. 194, the question was whether three unfinished machines could pass by a mortgage in which they were described as "planing-machines" in a certain shop.

Mr. Justice Swan, delivering the opinion of the court, remarked that a mortgage of "all the stock, tools, and chattels, belonging to the mortgagor, in and about a wheelwright-shop occupied by him," is not void as to creditors, and the mortgagee may show, by parol evidence, what articles were in and about the shop when the mortgage was made: *Harding v. Coburn*, 12 Met. 333 [46 Am. Dec. 680]; *Morse v. Pike*, 15 N. H. 529; *Burditt v. Hunt*, 25 Me. 419 [43 Am. Dec. 289]; *Wolfe v. Dorr*, 24 Id. 104; *Winslow v. Merch. Ins. Co.*, 4 Met. 306 [38 Am. Dec. 368].

He then says: "The principle to be deduced from these cases is, that any description which will enable third persons to identify the property, aided by inquiries which the mortgage itself indicates and directs, is sufficient."

Here, then, we have three rules by which to judge of the sufficiency of the description in the case at bar.

The description of the property in question in Perry's mort-

gage is "124 head of mules, now in the territory of Kansas," and "one pair of claybank horses."

The property claimed by defendant in error, by virtue of this mortgage, and delivered to him by virtue of the order of replevin, is described by him in his affidavit, upon which the order is obtained, as follows, viz.: "Nineteen mules, most of them branded with the letter 'P,' and all of them were worked to Salt Lake City and back the present year," and "one yellow pony with some white about him."

We are forced to the conclusion that when tested by either of these rules, the description of the mules is far less full, definite, and satisfactory than it might have been made, and that of the pony is fatally defective.

If the mules had been described in the mortgage as they were in the affidavit, or as being all the mules the mortgagor had in said territory of Kansas, or as the same then in the care of H. C. Branch, in Leavenworth County, Kansas, third persons might, in the language of Judge Swan, have been able to identify the property, aided by the inquiries which the mortgage itself would, in that case, have indicated and directed.

It does not appear how many other mules Perry had in Kansas at the time the mortgage was made, but he might have had a much larger number than he chose to include in the mortgage, and as there was nothing to distinguish those intended to be included in the mortgage from the rest, an indefinite amount of stock might, perhaps, have been shielded from the claims of creditors by the mortgage of a small part of them.

It is difficult to see how the "yellow pony with some white about him" can be claimed under the description in the mortgage of "one pair of claybank horses." Though a "pony" is defined by Webster to be a "small horse," the terms "horse" and "pony" are not in common usage and acceptation synonymous or convertible terms, but on the contrary, the term "pony" is used to distinguish from horses in general a peculiar breed, having well-known and strongly marked characteristics. If the description in the mortgage of "one pair of claybank horses" was meant to include a "yellow pony with some white about him," it must be deemed a singularly inapt and unsatisfactory description, nor is it aided in the slightest degree by the context. The mules are referred to as being 124 in Kansas, and 4 in Platte County, Missouri; but though the

pany appears to have been in Kansas, it is not so stated in the mortgage. The expression, "a pair of horses," would ordinarily be understood to mean a matched pair, or at least a pair mated and used together; and the next articles mentioned in the mortgage are "one rockaway, and the harness belonging to the same," tending to strengthen the supposition that the claybank horses were carriage-horses, which ponies ordinarily are not.

2. But it is further objected against the validity of the mortgage that while the instrument imports a delivery of the property upon its face, there was in fact no delivery or change of possession, either actual or constructive. That such delivery is essential to the validity of the mortgage as against third parties is unquestionable.

Justice Gibson remarks that delivery of the subject-matter of the contract is as requisite in the case of a mortgage of goods as it is in the case of an absolute sale: *Clow v. Woods*, 5 Serg. & R. 278 [9 Am. Dec. 346].

Justice Woodbury says: "In all cases of personal property mortgaged, the mortgagee ought to take possession, or place his lien on record for notice to the world": *Leland v. Medora*, 2 Wood. & M. 103.

And to the same effect, Chief Justice Shaw of Massachusetts: "By the general rule of the common law, upon a transfer of goods, whether absolute or conditional, as against third persons, there must be a delivery, and in general, also, the custody and possession of the goods must be retained by the vendee": *Bullock v. Williams*, 16 Pick. 34.

It is, however, well settled that in states where the statutes provide for the registration, filing, or recording of such mortgages, such recording is equivalent to delivery; as, for example, in Maine, where it was held that "registration is a substitute for delivery, and a mortgage duly recorded is valid against all the world, though the mortgagor retain possession as before": *Smith v. Smith*, 24 Me. 555.

So in Massachusetts: "By our statute, the registration of a mortgage of personal property is substituted for delivery of possession; and a mortgage duly executed and recorded is effectual to pass the property described in it without any other act or ceremony": *Shurtleff v. Willard*, 19 Pick. 211.

Similar statutory provisions exist in most of the states of the Union: See 2 Hilliard on Mortgages, Appendix.

This brings us to consider whether the recording of the

Perry mortgage in Platte County, Missouri,—being the county of the mortgagor's residence,—can, as to property in Kansas, be considered as a substitute for and equivalent to the delivery of such property, and the continued change of possession which would otherwise be indispensable.

The chief object of registration is, unquestionably, to give notice to all the world, and especially to creditors of the mortgagor, of the existence of the lien.

It is now generally provided by the statutes of the several states that personal mortgages, like those of real estate, shall be publicly registered or recorded, in order to give them validity against any one but the parties themselves, unless the mortgagee take and retain possession of the property, in which case registration is dispensed with because the purpose of it—notice of the encumbrance—is accomplished in another way: 2 Hilliard on Mortgages, 244.

To the same effect, Chief Justice Shaw remarks that “registration is required, as giving equal and perhaps greater notoriety to the transaction than delivery and retaining possession”: *Bullock v. Williams*, 16 Pick. 34.

Such being the object and purpose of registration, can it be reasonably argued that the purpose is accomplished by the registration in this case?

The property in dispute was, at the time of making and recording the mortgage, in Kansas, and parties in Kansas were perhaps dealing with and giving credit to the mortgagor from the knowledge that he possessed such property, to which they might look for repayment. If the registration of Perry's mortgage in Platte County, Missouri, must be held to be notice to such creditors, because Perry lived in Platte County, then registration in St. Louis County, Missouri, or in any other county in Maine, Florida, Texas, or Oregon, must be held as equally valid as notice to creditors here, in case their debtors owning property here reside in those counties.

But the fact is too plain for argument that such registration would not be notice to creditors here in any beneficial sense.

But it is still contended for plaintiff in error that if the mortgage created a lien, valid by the laws of Missouri, it is valid here, and the cases of *Kanaga v. Taylor*, 7 Ohio St. 134 [70 Am. Dec. 62], *Offutt v. Flagg*, 10 N. H. 46, and *Martin v. Hill*, 12 Barb. 632, are cited in support of the asserted claim.

In the case of *Kanaga v. Taylor*, *supra*, the court held that where Gregory, residing in New York, purchased of Kanaga



a piano, for which he paid in part, and gave a chattel mortgage upon the piano for the balance, which mortgage was recorded as required by the terms of New York, and afterwards Gregory removed to Ohio and pledged the piano to one Moore, who in turn sold it to Taylor, the defendant, without notice of encumbrance. The court held that Kanaga was entitled to recover of Taylor, by virtue of his mortgage, the amount due to him on the piano, from Gregory, and in support of their decision the court (Bowen, J.) use the following language, viz.:—

“Holding this instrument, then, as the plaintiff did, as a legal and valid one, by the law in force where he obtained it, he was entitled to enforce it; but as the power to do that had been out off by the removal of the property beyond the jurisdiction of the state, it was proper for him to sue in the courts of this state, and to derive the same relief by his action as if he were pursuing a remedy where the contract was made”: *Kanaga v. Taylor*, 7 Ohio St. 141, 142 [70 Am. Dec. 62].

Without deeming it necessary to controvert this reasoning, it is sufficient for our present purpose to remark that the case of *Kanaga v. Taylor*, *supra*, may be distinguished from the one at bar, from the fact that in the former the property mortgaged was at the time of the mortgage in the state and county where the mortgage was recorded; was subject to the jurisdiction of that state, and hence a valid lien was created by the registration; while in the case at bar, the property being in Kansas, while the mortgage was executed and recorded in Missouri, we must concede to the legislature of Missouri an extraterritorial force and efficiency, not claimed in *Kanaga v. Taylor*, 7 Ohio St. 134 [70 Am. Dec. 62], for the legislature of New York, in order to support the validity of the lien here claimed.

So in the case of *Offutt v. Flagg*, 10 N. H. 46, where it is held that “a mortgage made out of the state, which is valid according to the laws of the state in which it is executed, and the property is afterwards removed to New Hampshire, no registration is necessary.”

Upham, J., remarks: “The property was there; the contracting parties were there; and on every principle the *lex loci* governs”: *Offutt v. Flagg*, 10 N. H. 46.

In *Martin v. Hill*, 12 Barb. 631, where a yoke of oxen had been mortgaged in New York, and afterwards removed by the mortgagor into Vermont for a temporary purpose, and there

attached for a debt of the mortgagor, the courts of New York held the mortgage valid as against the attachment.

But in all these cases it will be seen that the property was at the time of the mortgage within the limits of the state under whose law it was recorded, while in the case at bar the record was made in Missouri, while the property was, and for a long time had been, in Kansas.

But the supreme courts of Vermont and Michigan, in direct opposition to the doctrine of the three cases above cited, have decided that a chattel mortgage, executed and recorded according to the laws of another state, where there is no change of possession; will not be valid as against the claims of attaching creditors, if the property is removed into those states: *Farnsworth v. Shepard*, 6 Vt. 521; *Woodward v. Gates*, 9 Id. 361; *Gates v. Gaines*, 10 Id. 349; *Lynde v. Melvin*, 11 Id. 686 [34 Am. Dec. 717]; *Kendall v. Samson*, 12 Id. 515; *Rockwood v. Collamer*, 14 Id. 141; *Skiff v. Solace*, 23 Id. 279; *Montgomery v. Wight*, 8 Mich. 143.

We will only remark further, that at the time this mortgage was executed and recorded in Missouri, there was no statute in force in Kansas providing for the registration of chattel mortgages here,—the Missouri statutes of 1855 having been repealed (see acts of 1859), and that the statute subsequently enacted expressly provides that such mortgages of property belonging to non-residents shall be recorded in the county in which the property is: Kansas Laws, 1860.

Ordered by the court that the judgment rendered in this cause, in the court below, be reversed, and the cause remanded for a new trial.

**CHATTEL MORTGAGE, DESCRIPTION OF PROPERTY IN,** what sufficient: See *Harding v. Coburn*, 46 Am. Dec. 680, and note 686; *Winslow v. Merchants' Ins. Co.*, 38 Id. 368. Where a chattel mortgage neither sufficiently describes the property nor states where it is situated, nor gives the place, county, or state where either the mortgagor or mortgagee resides, it is insufficient and defective: *Parsons Savings Bank v. Sargent*, 20 Kan. 580. The description, to be good, must contain either some hint which will direct the attention of those reading it to some source of information beyond the words of the parties to it, or something which will enable third parties to identify the property, aided by inquiries which the mortgage indicates and directs, or a description which distinguishes the property from other similar articles: Id.; *Tootle, Hanna, & Co. v. Lyster*, 26 Id. 597, both citing the principal case, which is cited in the last-mentioned case, and *Tindall, Adm'r, v. Wasson*, 74 Ind. 500, as an example of an insufficient description of property in a chattel mortgage.

**CHATTEL MORTGAGE, WHEN VALID** without delivery of mortgaged property: *Call v. Gray*, 75 Am. Dec. 141, and note 144. This case holds that registration is sufficient: See also *Googins v. Gilmore*, 74 Id. 472, and note 476.

**CHATTEL MORTGAGE EXECUTED IN ANOTHER STATE, VALIDITY OF:** See *Blystone v. Burgett*, 68 Am. Dec. 658, and note 662; *Kanaga v. Taylor*, 70 Id. 62, and note 70, citing the principal case. A chattel mortgage made, executed, and recorded in another state, according to the laws thereof, upon property situate in Kansas, is invalid as to creditors in the latter state: *Denny v. Faulkner*, 22 Kan. 99, and such mortgage is governed by the law of the place where the chattels are located when such mortgage is executed: *Ames Iron Works v. Warren*, 76 Ind. 516, both citing the principal case.

**REGISTRY LAWS, OBJECT OF, as to chattel mortgages:** See *Kanaga v. Taylor*, 70 Am. Dec. 62, and note 67 et seq.

**CASES**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**KENTUCKY.**

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**PHOENIX INSURANCE COMPANY v. LAWRENCE.**

[4 METCALFE, 9.]

**WHERE POLICY REQUIRES INSURED TO DELIVER ACCOUNT** of their loss, under oath, declaring the account to be true and just, together with other facts, the affidavit of the insured is admissible to prove a compliance with such condition, but for no other purpose.

**WHERE POLICY OF INSURANCE IS VOID** because the insured kept prohibited articles in the house, a promise on the part of the insurers' agent to pay a loss will not bind them, when the agent having authority to adjust and pay losses has knowledge that the prohibited articles were kept in the house at the time of the fire.

**WHERE HOUSE AND GOODS ARE INSURED** for separate sums, though the insurance on the house may be void, an incorrect description of the interest of the insured will not vitiate the insurance on the goods, in the absence of proof that the house was insured for a fraudulent purpose, or that the incorrect description of the interest of the insured in the house induced the insurer to insure the goods.

**CONSTRUCTIVE POSSESSION OF INSURED GOODS** by sheriff, under an execution, is not such change of possession as avoids the policy of insurance.

**DEED TERMINATING ACTUAL INTEREST** of the insured in goods, and transferring the actual possession to the purchaser, avoids the policy of insurance.

**UNDER POLICY OF INSURANCE CONTAINING CLAUSE** prohibiting "any transfer of the interest of the assured by sale or otherwise," without the consent of the insurer, a deed assigning the constructive possession of the insured goods to certain parties in trust for the benefit of creditors does not terminate the interest of the insured nor avoid the policy.

**KEEPING OF ARTICLES DENOMINATED AS HAZARDOUS**, in policy of insurance, after the issuing of such policy, if prohibited by it, does not render the policy void, but only suspends it, while the prohibited articles are kept in the premises.

**INSTRUCTION WITHOUT EITHER PROOF OR ALLEGATION** authorizing it is error.

**CONDITIONS OF KEEPING AND ENUMERATION** of articles mentioned as hazardous in policy of insurance forms part of it, and if prohibited by it, it is not necessary for the insurer to show that the keeping thereof caused the loss or increased the risk.

**KEEPING OF ARTICLES MENTIONED AS HAZARDOUS** in policy of insurance by the insured when they obtained the policy does not render it void unless they concealed that fact from the insurer.

**JURY HAS NO RIGHT TO DECLARE POLICY OF INSURANCE VOID** for the reason that the insured kept articles mentioned in such policy as hazardous and prohibited, when the insurer's pleadings fail to allege that any such articles were kept in the insured premises when the policy was issued, or that the insured made any concealment with reference thereto. Such is the rule, even though the above facts are proved.

**WHERE POLICY OF INSURANCE PROHIBITS** the keeping of certain articles specified therein as hazardous, in an action on the policy the insurer is not presumed to know what prohibited articles were kept by the insured, and is not bound to specify them in his pleadings; but if he specifies some without alleging that any others were kept by the insured, the jury should not be permitted to consider any except those specified.

**THE** opinion contains the facts.

*Benton and Nixon*, for the appellants.

*Mooar and O'Hara*, for the appellees.

By Court, BULLITT, J. The appellant, for a premium of fourteen dollars, insured J. B. Lawrence & Co. against loss by fire from the 25th of May, 1858, to the 25th of May, 1859, "to the amount of two hundred dollars, on their frame storehouse, situated on the Ohio River, in Gallatin County, Kentucky, known as Jackson's Landing, and twelve hundred dollars on their stock of goods in said storehouse."

The policy contains this clause: "The interest of the assured in this policy is not assignable unless by the consent of this company manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void."

It also contains this clause: "In case the above-mentioned premises shall, at any time . . . be appropriated, applied, or used to, or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous or extrahazardous, or specified in the memorandum of specified hazards, in the terms and conditions annexed to this policy, or for the purpose of storing therein any of the articles, goods, or merchandise in the same terms and conditions

denominated hazardous, extrahazardous, or included in the memorandum of special hazards, except herein specially provided for or hereafter agreed to by this company, in writing, to be added to or indorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease and be of no force or effect."

One of the conditions annexed to the policy declares that "applications for insurance must specify, . . . in relation to the insurance of goods and merchandise, or other personal property, whether or not they are of the description denominated hazardous, extrahazardous, or included in the memorandum of special hazards. And a false description by the assured of a building, or of its contents, or the concealment of any fact touching the risk to be assumed, . . . shall render absolutely void a policy issuing upon such description. . . . If after insurance is effected the risk is increased by any means within the control of the insured, or if such building or premises shall be so occupied in any way as to render the risk more hazardous than at the time of insuring, such insurance shall be void."

There is annexed to the policy an enumeration of not hazardous goods, etc., viz., "staple foreign dry goods in packages, and staple domestic dry goods, in stores where no hazardous merchandise is kept, and household furniture in dwelling houses," which "may be insured at five cents per one hundred dollars in addition to the rate of the building," and an enumeration of hazardous goods, etc., viz., oil, sulphur, grocer's stock, tallow, and several other articles, which "subject the building and all its contents to an additional charge of ten cents per one hundred dollars"; and dry goods (general stock of), boots and shoes, flour, teas, and other articles, which "are charged ten cents per one hundred dollars in addition to, but do not increase, the rate of the building"; and an enumeration of extrahazardous goods, etc., viz., resin, spirits of turpentine, and other articles, which "subject the building and all its contents to an additional rate of twenty cents per one hundred dollars; and china, unpacked fancy goods, and other articles, which are charged twenty cents per one hundred dollars in addition to, but do not increase the rate of the building"; and a memorandum of special hazards, in which it is declared that "gunpowder, phosphorus, and saltpeter are expressly prohibited from being deposited, stored, or kept in any building

insured, or containing any goods or merchandise insured by this policy, unless by special consent in writing on the policy."

Said house and goods were destroyed by fire on the 5th of April, 1859, and Lawrence & Co. afterward assigned their claim upon the policy to J. L. Eggleston, and joined him in bringing this suit for his benefit, asserting no claim for the loss of the house, but claiming twelve hundred dollars for the loss of the goods, and alleging in their petition that the defendant, by its authorized agent, had ascertained the amount of the loss, and promised to pay said sum of twelve hundred dollars. The defendant denied the alleged promise, and resisted a recovery upon the following alleged grounds, among others: 1. That Lawrence & Co., when they obtained the insurance, represented themselves as the owners of said house, when in truth they were not; 2. That they had sold and disposed of the goods before the loss, and had no interest therein when the loss occurred; 3. That said house, at the time of the fire, was used to keep and store gunpowder, sulphur, resin, turpentine, and oil.

There was evidence conducing to prove that the adjusting agent of the defendant, after inquiring into the loss, had promised to pay the said sum of twelve hundred dollars.

It appeared that said storehouse belonged, not to Lawrence & Co., but to Lawrence, a member of the firm,—there was no evidence of any representation on the subject except that furnished by the policy.

It appeared that on the 22d of March, 1859, the members of said firm signed a deed conveying said goods to Casey and Yeager, in trust, to pay debts due to them and the other creditors of Lawrence & Co.; but there was conflicting evidence upon the question whether or not the deed had been delivered and accepted, so as to take effect between the parties. And there was evidence conducing to prove that an execution remaining in the sheriff's hands had been levied on the goods, which, however, were left in the possession of Lawrence & Co.

There was evidence conducing to prove that sulphur, resin, turpentine, oil, and saltpeter were in the house, forming part of the stock of goods at the time of fire.

There was no evidence that any inquiries were made of the insured as to the character of their stock of goods; no evidence except that furnished by the policy, either as to the character of the goods, when the insurance was obtained, or as to the representations of the insured upon the subject; and no evi-



dence as to the ordinary rate of insurance upon goods not hazardous.

The plaintiffs obtained a verdict and judgment for \$1,294, being the amount insured upon the goods, with interest, from which judgment the defendant appealed.

1. The first question relates to the affidavit of the plaintiff J. A. Eggleston, one of the firm of Lawrence & Co., which the plaintiffs were permitted to read to the jury. The eighth condition of the policy required the insured to deliver an account of their loss, with their oath or affirmation declaring the account to be true and just, and several other facts. The defendant denied that the plaintiffs had complied with that condition. Eggleston's affidavit was admissible to prove such compliance, but for no other purpose; and the court below should have so informed the jury.

2. The next question relates to the effect of the alleged promise by defendant's agent to pay the loss upon the goods. The court below instructed the jury, in substance, that though the policy had ceased to have any force or effect by reason of the plaintiffs having kept prohibited articles in the house, yet, if the defendant's agent, having authority to adjust and pay losses, with knowledge that the prohibited articles were kept in the house at the time of the fire, promised to pay said loss, that they must find for the plaintiffs. This we conceive was erroneous for two reasons: 1. Authority to the agent to adjust and pay losses would not give him a right to pay out the money of the defendant where no loss had been sustained, much less to bind the defendant by a promise to do so; 2. Conceding the most ample authority to the agent to bind the defendant, yet, if the policy was void at the time of the fire, there was no consideration for the promise to pay the loss. We are not prepared to admit that the premium paid to the defendant, in consideration of its agreement to assume the risk, formed even a moral consideration for its promise to pay a loss sustained by the plaintiffs, after they had vitiated the policy by violating its conditions. As this instruction was given at a former trial, at which the plaintiffs obtained a verdict for twelve hundred dollars, that verdict was properly set aside by the circuit judge, though not for that reason.

3. It is contended that the policy was void, because J. B. Lawrence & Co. did not own said storehouse, and that the court below erred in refusing so to instruct the jury.

Whether or not the insurance upon the house was void, we

need not decide. Conceding that it was, it does not necessarily follow that the policy was void as to the goods, which were insured for a separate sum. In many cases, policies have been held valid, though the interest of the insured was not correctly described: 1 Phillips on Insurance, sec. 640. In the absence of evidence it cannot be presumed that the plaintiffs procured the insurance upon the house for a fraudulent purpose, or that their supposed interest in the house induced the defendants to insure the goods. Policies upon goods in rented houses are not unusual. Upon the facts as presented we perceive no reason for excepting this case from the general rule, by which a policy making separate insurance upon several subjects is treated as separate policies would be. Where a policy made separate insurance upon two buildings, with a clause declaring it void if the insured should alienate the property insured, it was held that an alienation of one of the buildings did not avoid the policy as to the other: *Clark v. New England Mut. Ins. Co.*, 6 Cush. 342 [53 Am. Dec. 44]. That is an authority for the proposition that if Lawrence & Co. had owned the house, and had sold it after taking the policy, this would not have vitiated the insurance on the goods, though it might have diminished their interest in preserving the house, and consequently, their interest in preserving the goods. And in the case of *Loehner v. Home Mutual Ins. Co.*, 17 Mo. 247, it was held that a policy upon a house and its furniture, though void as to the house, because the insured failed to give notice of an encumbrance, was not therefore void as to the furniture. We perceive no reason for applying a different principle in this case.

4. The defendant asked the court to instruct the jury that "if they believe that the possession of said goods was taken from J. B. Lawrence & Co. by the sheriff, or any other person or persons, such change of possession voided the policy, and the defendant is not liable upon it." In our opinion that instruction was properly refused.

There was no evidence that any one had taken the actual possession of the goods from Lawrence & Co.

Conceding that the sheriff had a constructive possession of the goods, by virtue of the levy of an execution upon them, still Lawrence & Co., having the actual possession, had the same power as well as the same interest to preserve them which they would have had if the execution had not been levied, and the policy continued in force notwithstanding the

levy: *Clark v. New England Mut. Fire Ins. Co.*, 6 Cush. 354 [53 Am. Dec. 44].

The deed to Casey and Yeager presents a more difficult question. If that deed had taken effect between the parties, it gave to Casey and Yeager constructive possession of the goods; and if it terminated the interest of the insured in the goods, or if it was a transfer of their interest within the clause of the policy previously cited, it avoided the policy, and the court should have modified the instruction accordingly, instead of overruling it.

The deed, conceding that it was delivered and accepted, certainly did not terminate the interest of the insured. No release had been executed by their creditors. They were as much interested in preserving the property, so that it might be applied to the payment of their debts, as if they had retained the legal title. They unquestionably had an insurable interest.

But the question remains, Did not said deed, if delivered and accepted, render the policy void under the clause prohibiting "any transfer of the interest of the insured by sale or otherwise," without the consent of the insurer? In 1 Phillips on Insurance, sec. 880, the case of *Dadmun Mfg. Co. v. Worcester Mutual Fire Ins. Co.*, 11 Met. 429, is cited as a decision that under such a clause the policy is rendered void by an assignment by the assured to assignees for the benefit of certain of his creditors. But in that case before the loss occurred the property was sold under an order of court in a suit against the assured and his assignees, and the assured had thus been deprived of all interest in it.

It has been repeatedly decided, with reference to policies containing similar clauses, that the policy is not rendered void by a mortgage of the property: *Conover v. Mutual Ins. Co. of Albany*, 1 N. Y. 290; S. C., 3 Denio, 254; *Folsom v. Belknap Mut. Fire Ins. Co.*, 30 N. H. 231; nor by a sale and conveyance, the grantee having simultaneously reconveyed to the grantor in mortgage: *Stetson v. Massachusetts Mut. Ins. Co.*, 4 Mass. 330 [3 Am. Dec. 217]; nor by a conditional sale: *Tittlemore v. Vermont Mutual Fire Ins. Co.*, 20 Vt. 546; nor by a contract to sell and convey at a future day, the purchaser agreeing on that day to pay a certain sum and secure the residue of the purchase-money: *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. 624; nor by a sale under execution, while the assured has a right to redeem. at least in the absence of

proof that the said right is of no value: *Strong v. Manufacturer's Ins. Co.*, 10 Pick. 40 [20 Am. Dec. 507]. In most of those cases there had been a technical transfer of the title and interest of the insured; in none of them did the insured retain a greater interest in the property than Lawrence & Co. did in the goods assigned to Casey and Yeager, admitting that the deed had taken effect.

The instruction given at the instance of the plaintiffs, that said deed did not pass the title to the goods, unless "Casey and Yeager accepted of the same, and received and took the possession and control of such goods," was clearly erroneous; but was not prejudicial to the defendant, because the deed, though it may have passed the title, did not avoid the insurance.

5. The defendant asked for an instruction "that if any of the articles denominated hazardous, extrahazardous, or included in the memorandum of special hazards were kept or stored in said storehouse during the continuance of said policy, that it became void.

It is clear that this should not have been given, because the keeping of those articles after the issuing of the policy, if prohibited by it, did not, as the instruction assumes, render the policy void, but only suspended it while the premises were so used.

6. The defendant asked for an instruction "that if any articles denominated in the classes of hazards, hazardous, extrahazardous, or included in the memorandum of special hazards, were embraced in the stock at the time of the issuing of the policy, or if the premises were used in keeping or storing any of the above prohibited articles at the time of the fire, then the said policy is void.

There was neither proof nor allegation authorizing that instruction.

This case cannot be placed upon the same footing as that of *Kentucky and Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. 634, cited by plaintiffs' counsel. The conditions and enumerations of hazards above mentioned formed parts of the policy as perfectly as if they had been inserted in the body of it. If, therefore, the keeping by the plaintiffs of the articles mentioned in the instruction was prohibited by the policy (whether by provisions in the body of it or annexed to it), it was not necessary for the defendant to show that the keeping thereof caused the loss or increased the risk: 1 Phillips on Insurance, sec. 866.

But the keeping of such articles by the plaintiffs, when they obtained the policy, did not render it void, unless they concealed that fact from the defendant.

There was no evidence as to what articles composed their stock at the date of the policy. At the date of the fire the stock embraced dry goods, fancy goods, groceries, boots and shoes, and many other articles denominated in the policy hazardous or extrahazardous. If that fact authorized the jury to infer that the stock embraced the same or similar articles at the date of the policy, they might perhaps have also had a right to infer that the defendant knew that the stock embraced those articles, or waived being informed concerning them: *Angell on Fire and Life Insurance*, sec. 176; 1 *Phillips on Insurance*, sec. 571; *Carter v. Boehm*, 3 Burr. 1905. And if it had appeared to the satisfaction of the jury that the defendant, when the policy was issued, knew that such articles were embraced in the stock, and were kept by the plaintiffs for sale as part of their regular business, possibly the issuing of the policy upon that stock of goods authorized the plaintiffs to keep those articles for sale, notwithstanding the prohibition contained in the printed parts of the policy: *Bryant v. Poughkeepsie Mut. F. Ins. Co.*, 21 Barb. 154; *Delonguemare v. Tradesman's Ins. Co.*, 2 Hall, 589; *Moore v. Protection Ins. Co.*, 29 Me. 97; *Leggett v. Aetna Ins. Co.*, 10 Rich. L. 202.

But we need not decide these questions, and do not propose now to express any opinion concerning them, because the defendant's pleadings do not allege that any such articles were kept in the store when the policy was issued, or that the plaintiffs made any concealment with reference thereto. Hence the jury would have no right to declare the policy void, even if it had been proved that when it issued the plaintiffs kept those articles and concealed the fact from the defendant.

That part of the instruction which relates to the keeping "of any of the above prohibited articles at the time of the fire" was also erroneous, because the defendant's pleadings charged the plaintiffs with having kept certain specified articles without charging them with having kept any others. The defendant, not being presumed to know what prohibited articles were kept by the plaintiffs, was not bound to specify them in its pleadings. But having done so, specifying some, without alleging that any others were kept by plaintiffs, the jury should not have been permitted to consider any except those specified.

The other instructions we need not notice. Upon the return

of the cause the defendant should be permitted, if it chooses, to amend its answer.

The judgment is reversed, and the cause remanded for a new trial, and other proceedings consistent with this opinion.

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**ERROR IN DESCRIPTION OF PROPERTY**, in policy of insurance, not fatal when: See *Jefferson Ins. Co. v. Colthall*, 22 Am. Dec. 567; note to *Fowler v. Aetna Ins. Co.*, 16 Id. 462.

**LEVY OF EXECUTION ON INSURED PROPERTY** is not such alienation as avoids the insurance: *Clark v. New England etc. Ins. Co.*, 53 Am. Dec. 44, and note 53.

**ALIENATION OF INSURED PROPERTY**, when avoids policy: See *Morrison v. Tennessee etc. Ins. Co.*, 59 Am. Dec. 299, and note treating the subject at length; *Power v. Ocean Ins. Co.*, 36 Id. 665.

**ALIENATION OF INSURED PROPERTY**, when does not avoid policy: *Jackson v. Mass. Mut. F. Ins. Co.*, 34 Am. Dec. 69, and note 73; *Morrison v. Tennessee etc. Ins. Co.*, 59 Id. 299, and note citing the principal case at p. 306. An executory contract for the sale of the insured property does not avoid the policy if the assured retains the title: *Hammel v. Queens Ins. Co.*, 54 Wis. 84, citing the principal case.

**ALIENATION OF ONE OF TWO HOUSES** insured in the same policy, but valued and insured separately, avoids the policy only as to the house alienated: *Clark v. New England etc. Ins. Co.*, 53 Am. Dec. 44. Under such circumstances, in case the insurance is on a house and goods, an alienation of the house does not avoid the policy on the goods: *Allison v. Phoenix Ins. Co.*, 3 Dill. 485, citing the principal case.

**EXCEPTION AS TO EXTRAHAZARDOUS RISKS** does not protect insurer when: See *Lounsbury v. Protection Ins. Co.*, 21 Am. Dec. 686; *Gates v. Madison County Mut. Ins. Co.*, 55 Id. 360; but see *Moore v. Protection Ins. Co.*, 48 Id. 514, and note 521.

**PRELIMINARY PROOF OF LOSS** made by the insured in accordance with the conditions of his policy, is admissible in evidence on the question of amount of loss: *Moore v. Protection Ins. Co.*, 48 Am. Dec. 514.

**INSTRUCTION ON MATTERS NOT IN EVIDENCE IS ERROR**: *State v. Hildreth*, 51 Am. Dec. 369; *Duggins v. Watson*, 60 Id. 560; *Barnes v. Meeda*, 49 Id. 390; *Gaither v. Myrick*, 66 Id. 316, and note 326; *Andre v. Bodman*, 71 Id. 628, and note 635; *Abbott v. Gatch*, Id. 635; *Hosley v. Brooks*, Id. 252; *Chicago etc. R. R. v. George*, Id. 239.

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## YEAKER'S HEIRS v. YEAKER'S HEIRS.

[4 METCALFE, 83.]

**ALIEN CANNOT INHERIT LANDS** in Kentucky; but an alien friend who has resided within the state two years is entitled to receive, hold, and pass any right to land within the commonwealth during the continuance of his residence after that period.

**TREATIES AS TO GOVERNMENT MAKING THEM** take effect not merely from the day of ratification, but from the date of their execution, unless they

contain stipulations to the contrary. But where they affect individual rights, the ratification of the treaty must be deemed its date.

TREATY IS PARAMOUNT TO STATE LAW, and the latter must yield to the extent of its conflict with the treaty, but it is void only so far as it contravenes the constitution, laws, or treaties of the federal government.

WHERE TREATY INVESTS ALIENS with an interest in lands, in certain cases, provided it is asserted within three years after the right accrues, their right is inviolable during such time, but after this the state may deny such right to that class of persons.

THE opinion contains the facts.

*George B. Kinkead*, for the appellants.

*M. C. Johnson*, for the appellees.

By Court, STILES, C. J. Peter Yeaker, a native of Switzerland, many years ago removed to and became a naturalized citizen of the United States. He died in Woodford County in this state, in July, 1853, the owner of a considerable estate in said county, consisting of land, slaves, and personalty. He left a widow, a native of this country, but no children, and all of his kindred, at the time of his death, were, and so far as the record shows continue to be, foreigners and citizens of Switzerland.

In 1859 proceedings were commenced for a sale and distribution of the estate between the widow and kindred of the intestate, and the circuit judge, having decided that the latter were not entitled to any part of the realty, they have prosecuted this appeal.

At common law an alien could not inherit land, and such has been and is still the law in Kentucky, except so far as it has been modified by statute. It was determined at an early day by this court that aliens could not inherit land in this state: *Hunt v. Warnicke*, Hardin, 61; *White v. White*, 2 Met. 187.

By an act of 1800 (1 Morehead & Brown's Digest, 112), an alien friend, residing in this state two years, was entitled to receive, hold, and pass any right to land within the commonwealth during the continuance of his residence after that period; and this provision was substantially embodied in the Revised Statutes, 1 Stanton, 239. But as neither of appellants were residents of Kentucky at the time of Yeaker's death, no benefit accrued to them under this statute.

Indeed, it is admitted that, unless they can claim under certain treaty regulations between the foreign state of which they are citizens, and the United States, the judgment of the



circuit court, declaring the widow entitled to the land, cannot be disturbed. And it therefore becomes necessary to consider and determine the scope and effect of the treaties relied on.

The first treaty between the United States and the Swiss Confederation, to which we have been referred, was ratified on the 3d of May, 1848, and is found in the United States Statutes at Large for that year.

Among other stipulations it contains the following:—

“ARTICLE 2. If, by the death of a person owning real property in the territory of one of the high contracting parties, such property should descend either by the laws of the country or by testamentary disposition to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property, a term of not less than three years shall be allowed to him to dispose of such property, and to collect and withdraw the proceeds thereof, without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which such real property may be situated.”

By the third article it is provided that said treaty shall remain in force for twelve years from its date, and further, until the end of twelve months after either government shall have given notice of its intention to terminate the same.

The second treaty seems to have been signed in November, 1850, but was not ratified until November, 1855: U. S. Stats. at Large, 1855. The official proclamation of the president, making it public as a law, speaks thus of the treaty, the period of its execution, and the amendments to the same:—

“Whereas, a general convention of friendship, reciprocal establishments, commerce, and for the surrender of fugitive criminals, between the United States of America and the Swiss Confederation, was concluded and signed by their respective plenipotentiaries in the city of Berne on the twenty-fifth day of November, 1850; which convention as subsequently amended by competent authorities of the respective governments, and being in the English and French language, is, word for word, as follows,” etc.

The stipulations of this treaty in regard to the subject now under consideration read thus:—

“ARTICLE 5. The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other by sale, testament, dona-

tion, or in other manner; and their heirs, whether by testament, or *ab intestato*, or their successors, being citizens of the other party, shall succeed to the said party, or inherit it, and they may take possession thereof, either by themselves or by others acting for them; they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated, shall be liable to pay in a similar case. In the absence of such heir, heirs, or other successors, the same care shall be taken by the authorities for the preservation of the property that would be taken for the preservation of the property of a native of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same.

"The foregoing provisions shall be applicable to real estate situated in the states of the American Union, or within the cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate.

"But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the state or in the canton in which it may be situated, there shall be accorded to the said heir or other successor such term as the laws of the state or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated."

If, as is contended by appellants, this last treaty, by relation back from November, 1855, the day of its exchange and ratification by the contracting powers, took effect and became the law of the land from November, 1850, the day of its date, without regard to the period or periods when the amendments referred to in the proclamation were agreed upon and adopted, we confess there is difficulty in avoiding the conclusion that appellants, under the articles cited, have an interest, to some extent, in the real estate of their deceased relative.

The constitution of the United States, in the second section of article 6, declares that "this constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the

authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The treaty before us seems to have been made with due solemnity between the contracting parties, adopted and ratified by the proper authorities, and proclaimed as the law of the land by the President. Its provisions with regard to real estate appear to have been carefully drawn, with an eye to the rights of the several states, and their local regulations, respecting such property within their boundaries, and give to the subjects of the Swiss Confederation only the share of the proceeds of the realty, when, by the laws of any state, they are forbidden from holding the realty itself.

It may be said to be the well-settled doctrine in relation to treaties, that as to the governments making them, they take effect, not merely from the day of ratification, but from the date of their execution, unless they contain stipulations to the contrary: Wheaton's International Law, 366; 1 Kent's Com. 170; *United States v. Reynes*, 9 How. 148, 289. But the rule seems to be otherwise where individual rights are to be affected thereby, as settled by the supreme court in the case of *United States v. Arredondo*, 6 Pet. 694. In regard to that point which was then raised, the court, in speaking of the treaty then under consideration, say: "That it may, and does relate to its date as between the two governments, so far as respects the rights of either under it, may be undoubted; but as respects individual rights in any way affected by it, a very different rule ought to prevail." And in the next sentence, after remarking that the point was not new, state that in regard to individual rights the rule is that the ratification of the treaty must be deemed its date.

Admitting, however, that the rule contended for in this case was the correct one, it is extremely questionable whether this court could say, in view of the proclamation of the President, *supra*, that the articles of the treaty relied on by appellants in support of their claim constituted any part of the original treaty when signed.

It seems that the original document was signed in November, 1850, but it further appears that it was subsequently amended. Now, what amendments were made, or when, does not appear. For aught that appears to the contrary, the very articles upon which the appellant founds his claim may have

been the only amendments made, and they may have been inserted long after Yeaker's death and the accrual of the widow's right. And in view of this state of uncertainty as to when the articles referred to were embodied, it would be difficult to say they were in force when Yeaker died. But this point need not now be decided, inasmuch as the treaty, for the reason heretofore stated, so far as Mrs. Yeaker's rights are concerned, did not go into effect until 1855, when it was ratified.

The treaty of 1848, in our opinion, is likewise insufficient to uphold appellant's claim to an interest in the property now in dispute: because (1) it may be seriously doubted whether the second article of said treaty intended to confer upon the citizens of the Confederation any right to real estate or its proceeds, unless the land was situate within the territories of the United States, that is, the districts of country known as "territories" and distinguished from the states.

The language is, "If, by the death of a person owning property in the territory of one of the high contracting parties, such property should descend," etc.

The doubt mentioned arises, not only because of the equivocal language thus used to describe the district of country in which the proposed right of succession or inheritance was to be conferred; but also from the fact that the treaty of 1855, in reference to the same matter, is specific and distinct in extending this right to land within the states of the Union, and also in providing for any conflicting state or local legislation,—thus showing that the contracting parties themselves deemed the right conferred by the previous treaty as not distinctly extended to the states.

But waiving the question arising upon a proper construction of the language of the treaty in regard to the point suggested, and giving full effect to the provision as contended for by appellants, still they are precluded from the interest claimed by lapse of time.

We have seen, and it is admitted, that by the law of Kentucky appellants could take no interest in the realty of their deceased relatives. It is also well known that by the statutes of descent (1 Stanton's ed. 420) the widow, in this case, took the entire real estate. This being the law of this state, it was in full force and effect, so far as the parties hereto are concerned, except as restricted by article 2 of the treaty of 1848. To the extent of its conflict with said treaty it must give way,

because, by the constitutional provision, *supra*, the treaty is regarded as paramount to the state law. The law of the state refuses all rights to appellants at any and all times; the treaty, however, invests them with an interest, provided it is asserted within a period of three years after the right accrues; or rather, it forbids any law limiting their right of recovery to less than three years, the effect of which is to permit any restriction by state legislation against such recovery, which will not interfere with the right for that period. The state law was, therefore, so affected by the treaty as to become inoperative for a period of three years, but no further,—it being a well-settled rule that when a state law is deemed unconstitutional, because opposed to the constitution, laws, and treaties of the federal government, it is only void so far as it contravenes the constitution, laws, or treaties. Beyond the three years, the period within which foreigners may claim such interest, there is no contravention, because there is nothing forbidding the state legislation which denies the right to that class of persons after that time.

It seems to us, therefore, that no error was committed by the circuit court in giving all the proceeds of the land to the widow,—appellants having permitted more than three years after Yeaker's death to elapse before they brought their suit or asserted their right.

Judgment affirmed.

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ALIEN CANNOT TAKE OR HOLD DOWER IN KENTUCKY: *Alsberry v. Hawkins*, 33 Am. Dec. 546, and note 550. But an alien may inherit lands in Louisiana: *Duke of Richmond v. Milne*, 36 Id. 613; and as to their right to take lands generally, see citations in notes to these cases; *McClenaghan v. McClenaghan*, 47 Id. 532.

TREATY IS SUPREME LAW OF LAND, and obligatory on all departments of the government, and on parties litigating in the courts: *Howell v. Fountain*, 46 Am. Dec. 415.

EFFECT OF TREATIES AS LAWS; AND POWER TO ANNUL THEM BY HOSTILE LEGISLATION.—1. NATURE OF TREATY OBLIGATIONS. — A treaty is primarily a compact between independent nations, and depends, for the enforcement of its provisions, on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this, judicial courts have nothing to do; but, as will be seen below, a treaty is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined: *Head Money Cases*, 112 U. S. 580, 598. As to treaties made with foreign countries and those made with Indian tribes, there is no distinction; for a treaty made with our native Indian tribes has the same effect and dignity as a

treaty with a foreign and independent nation: *Turner v. American B. M. Society*, 5 McLean, 349; *Worcester v. State of Georgia*, 6 Pet. 515; *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 198. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the federal constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and ought not to be sanctioned: *Haver v. Yaker*, 9 Wall. 35.

2. WHEN TREATIES TAKE EFFECT. — It is undoubtedly true, as a principle of international law, that as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard, the exchange of ratifications has a retroactive effect, confirming the treaty from its date. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratification: *Haver v. Yaker*, 9 Wall. 34; *United States v. Arredondo*, 6 Pet. 749; *United States v. Reynes*, 9 How. 127; *Davis v. Police Jury of Concordia*, Id. 280; *Hylton's Lessee v. Brown*, 1 Wash. C. C. 343; *Succession of Michael Schaffer*, 13 La. Ann. 113. A written declaration, annexed to a treaty at the time of its ratification, is as obligatory as if the provision had been inserted in the body of the treaty itself: *Doe v. Braden*, 16 How. 635; *In the Matter of Metzger*, 1 Edm. Sel. Cas. 399.

3. TREATY AS SUPREME LAW OF LAND. — A treaty may contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The constitution of the United States places such provisions as these in the same category as other laws of congress by its declaration that "this constitution and the laws made in pursuance thereof, and all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land": Art. 6. See also *Howell v. Fountain*, 46 Am. Dec. 415; *Foster v. Neilson*, 2 Pet. 253; *Turner v. American Baptist Missionary Union*, 5 McLean, 344; *In the Matter of Metzger*, 1 Edm. Sel. Cas. 399; *Wilson v. Wall*, 34 Ala. 288, that treaties are the supreme law of the land. A self-executing treaty requires no legislation to put it into operation: *Opinions of Justices*, 68 Me. 589; and consequently, it is to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision: *Foster v. Neilson*, 2 Pet. 314; *In the Matter of Metzger*, 1 Edm. Sel. Cas. 399. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not to the judicial, department; and the legislature must execute the contract before it can become a rule for the court: *Foster v. Neilson*, 2 Pet. 314. A



treaty is the supreme law of the land only when the treaty-making power can carry it into effect. Thus, both in this country and in England, money, when required by treaty to be paid, cannot be disbursed without legislative authority. Therefore a treaty which stipulates for the payment of money undertakes to do that which the treaty-making power cannot do, and the treaty, consequently, cannot be the supreme law of the land. The action of Congress is necessary to give it effect: *Turner v. American Baptist Missionary Union*, 8 McLean, 344.

4. TREATY OVERRIDES ANTECEDENT FEDERAL AND STATE STATUTES: *Hawenstein v. Lynham*, 100 U. S. 483; *Lessee of Gordon v. Kerr*, 1 Wash. C. C. 322; *Fisher v. Harnden*, 1 Paine, 55; *Baker v. City of Portland*, 5 Saw. 566; *Parrott's Chinese Case*, 6 Id. 349. Under section 10, article 1, of the constitution of the United States, and section 2, article 2, the treaty-making power has been surrendered by the states to the national government, and vested in the President and Senate of the United States. The stipulations, therefore, in a treaty between the United States and a foreign nation, are paramount to the provisions of the constitution of a particular state: *Lessee of Gordon v. Kerr*, 1 Wash. C. C. 322; and a state has no power to interfere with or in any way limit the operation of a treaty of the United States: *Baker v. City of Portland*, 5 Saw. 566. The principle that any provision of a state constitution, or state law in conflict with a foreign treaty, is void, has been applied in California and Oregon to the treaty between the United States and China, of June 18, 1868. This treaty recognizes the right of citizens of China to emigrate to the United States for purposes of curiosity, trade, and permanent residence; and provides that Chinese subjects residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel and residence as may be enjoyed by the citizens or subjects of the most favored nation: See articles 5 and 6, 16 U. S. Stats. 740. This treaty has been pronounced valid; and section 2 of article 19 of the constitution of California, providing that no corporation formed under the laws of the state shall, directly or indirectly, in any capacity, employ any Chinese or Mongolian, and requiring the legislature to pass such laws as may be necessary to enforce the provision, has been held to be in conflict with the sections named of said treaty, and void. So the act of February 13, 1880, Penal Code Cal., secs. 178, 179, to enforce said article of the constitution making it an offense for any officer, director, agent, etc., of a corporation to employ Chinese, has been held to violate said treaty, and to be void: *Parrott's Chinese Case*, 6 Saw. 349. So in a legislative act of the state of Oregon, which prohibited the employment by contractors of Chinese upon street improvements or public works, but permitted all other aliens to be so employed, was held to be in conflict with said treaty, which secures to the Chinese, resident here, the same right to be employed, and labor for a living, as the subjects of any other nation, and therefore void: *Baker v. City of Portland*, 5 Id. 566. The adoption of a treaty, with the stipulations of which the provisions of a state law are inconsistent, is equivalent to a repeal of such law: *Fisher v. Harnden*, 1 Paine, 55. A treaty between the federal government and a foreign country, giving citizens of such country the right and power to take lands by descent, and to hold them, in this country, overrides all state legislation to the contrary: *Kull v. Kull*, 37 Hun, 476; *Hawenstein v. Lynham*, 100 U. S. 483. And this ought to be true, because the constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution: See case last cited, p. 490.



5. POWERS OF CONGRESS OVER TREATIES—CONGRESS MAY ABROGATE—CONFLICT OF TREATY AND FEDERAL STATUTES.—While treaties are, under the constitution, the supreme law of the land, so also are the acts of Congress. The language of the constitution is: "This constitution and the laws made in pursuance thereof and all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land"; Art. 6. An act of Congress, then, is as much a supreme law of the land as a treaty. They are placed on the same footing and no preference or superiority is given to one over the other: 5 Opinions of Attorney-General, 345. There is nothing in the constitution which assigns different ranks to treaties and to statutes. The constitution itself is of higher rank than either by the very structure of the government. A statute not inconsistent with it and a treaty not inconsistent with it, and relating to subjects within the scope of the treaty-making power, seem to stand on the same level and to be of equal validity: 13 Opinions of Attorney-General, 357. The constitution, therefore, gives a treaty no superiority over an act of Congress, for as an act of Congress may be repealed or modified by an act of a later date, so is there nothing in a treaty which makes it irrepealable or unchangeable, nor is there anything in its essential character or in the branches of the government by which the treaty is made, which gives it this superior sanctity: *Head Money Cases*, 112 U. S. 580, 599. From this view of the equal authority of treaties on the one hand, and acts of Congress on the other, it follows that the earlier in date will yield to the later; that a treaty made subsequently to the passage of an act by Congress will repeal such act so far as there is any conflict or inconsistency between them; and, conversely, a law passed by Congress subsequently to the making of a treaty has the same effect upon the treaty. And this is the view taken by the courts in *United States v. The Schooner Peggy*, 1 Cranch, 103, where a French schooner was captured, libeled, and condemned as a lawful prize under the statute, and while the case was on appeal to the supreme court, a treaty was entered into with France, changing the rule of law in application to captures, so that under it the vessel would not have been condemned. The treaty was held to annul the law under which the vessel was condemned; and though admitting the condemnation to have been lawful when made, the court ordered the vessel to be restored. In *Foster v. Neilson*, 2 Pet. 253, Marshall, C. J., said that a treaty was "to be regarded as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision," and affirmed the doctrine that a treaty may repeal a law of Congress: See also 6 Opinions of Attorney-General, 293. The converse rule that Congress may abrogate a treaty has been repeatedly held: *Ropes et al. v. Clinch*, 8 Blatchf. 304; *United States v. Tobacco Factory*, 1 Dill. 284; *United States v. McBratney*, 104 U. S. 621, 623; *The Cherokee Tobacco*, 11 Wall. 616; *Whitney v. Robertson*, 21 Fed. Rep. 566; 5 Opinions of Attorney-General, 345; 13 Id. 357.

In *Head Money Cases*, 112 U. S. 580, Miller, C. J., said: "The precise question involved here, namely, a supposed conflict between an act of Congress imposing a customs duty, and a treaty with Russia on that subject in force when the act was passed, came before the circuit court for the district of Massachusetts in 1855. It received the consideration of that eminent jurist, Mr. Justice Curtis, of the court named, and who in a very learned opinion exhausted the sources of argument on the subject, holding that if there were such a conflict the act of Congress must prevail in a judicial forum: *Taylor v. Morton*, 2 Curt. 454. And Mr. Justice Field, in a very recent case in the ninth circuit, that of *Ah Lung*, 18 Fed. Rep. 28, on -

writ of *habeas corpus*, has delivered an opinion sustaining the same doctrine in reference to a statute regulating the immigration of Chinese subjects into this country. In the *Clinton Bridge Case*, 1 Woolw. 150, 156, the writer of this opinion expressed the same views as did Judge Woodruff on full consideration in *Ropes v. Olmich*, 8 Blatchf. 304; and Judge Wallace in the same circuit in *Bartram v. Robertson*, 15 Fed. Rep. 212. . . . In short, we are of opinion that so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal." But while there is no doubt as to the power of Congress to pass laws conflicting with existing treaties, the court will not impute to Congress an intention to violate any important article of a treaty with a foreign power unless that intention be clearly and unequivocally manifested, and the language of the law, which is supposed to constitute the violation, admits of no other reasonable construction: *Re Chin A On*, 18 Id. 506. It must be understood, however, that in the execution of its treaty obligations with respect to property claimed under foreign laws, the government may act by legislation directly upon a claim preferred, withdrawing it from further consideration of the courts under the provisions of a general act: *Grisar v. McDowell*, 6 Wall. 379.

6. PROVINCE OF JUDICIARY RESPECTING TREATIES. — Congress has no power to settle rights under treaties except in cases purely political. As to what constitutes political questions respecting treaties, as contradistinguished from judicial ones, see *Doe v. Braden*, 16 How. 635. Whether a treaty has been violated by our legislation so as to be the proper occasion of complaint by a foreign government, is not a judicial question. To the courts, it is simply the case of conflicting laws, the last modifying or superseding the earlier: *In re Ah Lung*, 18 Fed. Rep. 28. The construction of them is the peculiar province of the judiciary when a case shall arise between individuals: *Wilson v. Wall*, 6 Wall. 83, 89. We have seen that a treaty may confer private rights on citizens or subjects of the contracting powers which are of a nature to be enforced in a court of justice, and when such rights are of this nature the court will resort to the treaty for a rule of decision for the case before it, as it would to a statute: *Head Money Cases*, 112 U. S. 599. But the courts have no power to question, or in any manner to look into, the powers or rights recognized by it in the nation or tribe with whom it was made: *Maiden v. Ingersoll*, 6 Mich. 373. So the courts of the United States cannot question the power of the other party to a treaty to do certain acts when he has been treated as having the power by the President and Senate: *Doe v. Braden*, 16 How. 635; *Fellows v. Blacksmith*, 19 Id. 366. But where a treaty makes no special provisions for deciding questions of individual identity, they must be decided by the judicial tribunals of the country: *Stockton v. Williams*, Walk. Ch. 120.

**BARDSTOWN AND LOUISVILLE RAILROAD COMPANY  
v. METCALFE.**

[4 METCALFE, 199.]

**SECTION 33 OF KENTUCKY CODE, ENABLING TRUSTEES** to bring actions in their own names without joining the beneficiaries, has not changed the rule under the old practice providing that a trustee under a mortgage made to secure the payment of money to others could not sue for a foreclosure and sale without making the *cestuis que trust* parties.

**TRUSTEE, TO MAINTAIN ACTION IN HIS OWN NAME**, without joining the *cestuis que trust*, under section 37, code of Kentucky, must allege or show that the beneficiaries are numerous, and that it is impracticable to bring them before the court within a reasonable time.

**WHEN TRUSTEE IS ENTITLED TO SUE IN HIS OWN NAME** without joining the beneficiaries, it is error to give him judgment for the money. The court should retain control over it for the benefit of those entitled to it.

**CHARACTER OF CORPORATION, WHETHER PRIVATE OR PUBLIC**, depends upon the purposes for which it was formed, and the powers conferred upon it, and not upon the character of its stockholders. It does not alter its character that the state or the United States owns a portion of its stock.

**RULES OF CONSTRUCTION WHICH APPLY TO CHARTERS** delegating sovereign powers to corporations do not depend upon the question whether they are public or private. They depend on the character of the powers conferred, and the purposes of their organization.

**POWER OF RAILROAD OR OTHER PRIVATE CORPORATION** to take private property for its use, being a delegation of sovereign power, must be construed as it would be if delegated to a municipal corporation; whilst the powers of private and public corporations with respect to their property are governed by the same principles, and in the absence of express provisions of law, depend upon the purposes for which the corporation was formed.

**GENERALLY PRIVATE CORPORATION HAS IMPLIED POWER** to do whatever may be necessary to execute its express powers, and to accomplish the purposes for which it was formed.

**RAILROAD CORPORATION EXPRESSLY AUTHORIZED** to borrow money with which to construct its road, but not expressly authorized to make a mortgage for the payment of such money, has an implied power to do so, but cannot mortgage its corporate existence, or any prerogative franchise conferred upon it. The right to build and use the road is not, however, a prerogative franchise, and a purchaser under the mortgage would take the road subject to the terms of the charter designed to protect the public, and would be fully bound thereby.

**MORTGAGE BY RAILROAD COMPANY** to secure money borrowed for the construction of its road is not opposed to the public policy of Kentucky. This is indicated by the general course of legislation upon the subject.

**WHERE RAILROAD CORPORATION VOLUNTARILY MORTGAGES ITS PROPERTY** to secure money which it is expressly authorized to borrow, and the bondholders invest their money upon the faith of the mortgage, this is sufficient to take the case out of the rule that a turnpike road cannot be sold for a general debt of the corporation.

**RESOLUTION OF DIRECTORS OF RAILROAD CORPORATION** authorizing a mortgage of "the road and its property, etc.," is sufficient to authorize a

mortgage of the "railroad, with all its rights and privileges," as there was nothing to which the phrase "etc." could have been designed to apply except the franchises, and therefore must have been used to embrace them.

**RESOLUTION OF DIRECTORS OF RAILROAD CORPORATION** authorizing a mortgage of the road and its property must design a transfer of the right to operate the road.

**WHERE MORTGAGE OF RAILROAD AND ITS PROPERTY** authorizes a sale upon failure to pay either the principal or interest to satisfy "the amount claimed and due," but contains no provision that the principal shall become due upon a failure to pay interest, until such principal becomes due, the bond-holders have no right to insist on payment of it by foreclosure or otherwise. But they have a right to a sale for the interest due; and if the property is divisible, it would be proper to order a sale of only so much as might satisfy the amount due. If it is not susceptible of division, it must be sold or leased as an entirety.

**WHERE MORTGAGE OF RAILROAD AND ITS PROPERTY** authorizes a sale upon failure to pay either the interest or principal "to satisfy the amount claimed and due," and the property is worth much more than the debt and interest, it may be leased at public auction, for the shortest term that will bring the amount due, and accruing interest and principal as the same shall become due. If no lessee is found, then it may be sold absolutely, the company to elect whether or not the property shall be offered in the first instance for a term of years, and if sold, the purchaser to give bonds, with approved security, for the purchase-money, including the accruing interest and principal, and a lien on the property should be reserved as additional security. If leased, the lessee should be required to give a covenant, with approved security, to keep in good repair the road and property, and to return the same to the company at the end of the term in as good condition as it may be when received. An inventory of the property should be filed in the cause and declared in the decree ordering the lease, to be conclusive evidence of the condition and value of the property at the time of the lease.

THE opinion states the facts.

*Newman and Wickliffe*, for the appellant.

*Elliott and McKay, and Harlan and Harlan, Jr.*, for the appellee.

By Court, **BULLITT, J.** The appellant's board of directors was authorized by its charter to borrow, on its credit, a sum not exceeding fifty thousand dollars. The board authorized its president to borrow thirty thousand dollars, and as security therefor, to execute a mortgage "upon the road and its property, etc." The president executed a mortgage to the appellee, Metcalfe, as trustee, upon "the said railroad with all its rights and privileges," to secure its bonds for said thirty thousand dollars. The bonds were dated January 1, 1860, and payable ten years after date, with interest payable semiannually.

In September, 1860, Metcalfe, as trustee, filed a petition alleging that said bonds had been "sold to divers persons," and that the appellant had failed to pay the interest due July 1, 1860, and by amended petitions, the last of which was filed at the March term, 1862, he alleged that three other installments of interest were due and unpaid. At the same term the court rendered a judgment that Metcalfe recover of the appellant the interest then due, three thousand six hundred dollars; that the mortgage be foreclosed, and that the mortgaged property be leased to the highest bidder for a term of eight years, from January 1, 1862, to pay to Metcalfe said sum, and also the interest thereafter to accrue, and the principal when the same should become due; and if no one would lease the property on those terms, then that it be sold to the highest bidder to pay said principal and interest, and that for any surplus it might bring, the commissioner should take bonds to himself for the benefit of those concerned. From that judgment this appeal was taken.

A demurrer to the petition, because the bond-holders were not parties to the suit, was overruled, and presents the first question to be considered.

It is contended that Metcalfe had a right to sue, without making the bond-holders parties, under section 33 of the code, which declares that "an executor, administrator, guardian, trustee of an express trust," and other fiduciaries therein mentioned, "may bring an action in his own name without joining with him the person for whose benefit it is prosecuted."

In the case of *Anderson v. Watson*, 3 Met. 509, it was held that a guardian cannot sue in his own name for personal property of his ward unlawfully detained by another, and the court said: "The guardian can, and could, before the code, sue in his own name upon a note taken by him for money of his ward. Under section 30 of the code, declaring that every action must be prosecuted in the name of the real party in interest, except as provided in section 33, it might have been necessary to sue in the infant's name upon such a note but for the provision in section 33 relating to guardians. In our opinion, the effect of section 33, so far as it relates to guardians, is to enable them to sue as they could have done before the code, without joining the wards in the action." This reasoning applies to the provisions of section 33 concerning trustees. Under the old practice, a trustee could sue at law for property to which he held the legal title. Section 30 might

have made it necessary to bring such a suit in the name of the beneficiary, but for the provision in section 33. So, under the old practice, the trustee might sue in equity without making a *cestui que trust* a party, in cases where the trustee was entitled to receive and hold the money or property for the benefit of the *cestui que trust*: Calvert on Parties, 212-215. This rule might have been changed by section 30, but for the provision in section 33. But under the old practice a trustee, under a mortgage made to secure the payment of money to others, could not sue for a foreclosure and sale without making the *cestuis que trust* parties: Story's Eq. Pl., sec. 201. And in our opinion, the framers of the code did not intend to give right to such a trustee. The cases of *McClanahan v. Beasley*, 17 B. Mon. 111, and *Newport v. Taylor*, 16 Id. 781, are cases in which the trustee could have sued under the old practice without making the beneficiaries parties. But Metcalfe has no right to receive either the principal or interest of the mortgage bonds, payment of which he seeks to enforce. The bond-holders were, therefore, necessary parties to the suit, unless, as is also contended, Metcalfe had a right to maintain the action under section 37 of the code, which declares that "where the question is one of a common or general interest of many persons, or where the parties are numerous and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all."

Here are two distinct grounds, upon either of which one person may sue for the benefit of others, viz.: 1. Where the plaintiff has a common or general interest with many others; 2. Where the persons interested, but not having a common or general interest, are numerous and it is impracticable to bring them all before the court in a reasonable time.

Metcalfe's right to bring this action cannot be maintained upon the first ground: 1. Because he sued as trustee, and not as bond-holder, and there is no common or general interest between the trustee and bond-holders; 2. Because he failed to state the number of bond-holders, or even to allege that there are many of them. Nor can it be maintained upon the second ground, because he has failed to allege or otherwise to show that the bond-holders are numerous and that it is impracticable to bring them all before the court within a reasonable time. We do not suppose that the framers of the code meant to authorize a person having no interest in a suit, nor any duty

to perform concerning it, to sue for the benefit of the persons interested, however numerous they may be. And if Metcalfe had been a naked trustee, with no duty to perform except to hold the legal title for the benefit of the bond-holders, we doubt whether he could have maintained the action, however numerous he might have shown them to be. But the mortgage declares that "upon failure of said company to pay the interest or principal of said bonds when due and demanded, the said trustee shall proceed, by due course of law, to subject the said railroad and all its effects to sale to satisfy the amount claimed and due." In our opinion, as the deed made it the duty of Metcalfe to sue for a sale of the road, he might have maintained the action if he had shown that the bond-holders were numerous and that it was impracticable to bring them before the court within a reasonable time. But as he failed to do so, the demurrer for a defect of parties should have been sustained.

2. Even if he had shown himself entitled to maintain the action, without making the bond-holders parties, it would have been erroneous to give him a judgment for the money. The court should have retained control over it for the benefit of those entitled to it.

As the errors above mentioned may be corrected upon the return of the cause, it is proper that we should consider several other alleged errors in the judgment and other proceedings of the court below.

3. It is contended that the court erred in refusing to permit the appellant to file an amended answer, offered at the March term, 1862.

The only ground of defense presented by that answer is, that under the charter of the appellant the town of Bardstown and three districts of Nelson County were authorized to take, and did take and yet hold, a part of its stock. It is argued that those corporations, by becoming stockholders of the appellant, converted it into a public corporation; and therefore, that in deciding what are its powers, we must adopt those strict rules of construction which apply to charters delegating sovereign powers to public corporations. That position is not considered tenable. The character of a corporation depends upon the purposes for which it is formed and the powers conferred upon it, and not upon the character of its stockholders. "It does not alter the character of a corporation that the state



or the United States own a portion of its stock": 6 Redfield on Railways, and cases cited.

Nor does the principle of construction contended for as applicable to this case depend upon the question whether the corporation is a private or public one. It depends on the character of the powers conferred and the purposes of the organization. The power of a railroad or other private corporation to take private property for its use, being a delegation of sovereign power, must be construed as it would be if delegated to a municipal corporation; while the powers of private and public corporations, with respect to their property, are governed by the same principles, and in the absence of express provisions of law depend upon the purposes for which the corporation was formed. As the answer presented no fact material to the defense, the motion to file it was properly overruled.

4. It is contended that the appellant had no power to mortgage its road or franchises. This question, and the next one that we shall consider, were raised by a general demurrer to the petition. Generally, a private corporation has an implied power to do whatever may be necessary to execute its express powers, and to accomplish the purposes for which it was formed. The appellant was expressly authorized to borrow this money, but was not expressly authorized to make a mortgage. Had it not an implied power to do so? It cannot be doubted that a manufacturing corporation having power, express or implied, to borrow money, might, unless expressly prohibited, mortgage its property to secure the debt. But it is contended that a railroad corporation stands upon a different footing, because its road is built for public use as well as for the profit of its stockholders; that it is under a duty to the public to keep its road in repair, and carry on its business for the transportation of freight and passengers; and that it cannot relieve itself from those duties by conveying its road away.

These views seem to be sustained by several English decisions. At any rate, it seems to be settled in England that a railway company cannot, without express authority from Parliament, assign or mortgage or lease its road, upon the ground that it is against public policy. An examination of several of those cases does not enable us to state the precise views of public policy out of which that doctrine sprung. It probably arose in part of a general statute which is not in force here. Judge Redfield, however, says: "The ground upon which the decisions in England and America, which hold the franchises

of corporations not to be assignable, except by consent of the legislature, rest is mainly the same as that upon which it has been held in this country, that such franchises are beyond the legislative control; namely, that the charter constitutes a contract between the sovereignty and the corporation, on the one part, for the grant of certain privileges and immunities, and upon the other, for the performance of certain duties and functions which are deemed an equivalent or consideration. . . . The state confers upon railways some of its most essential powers of sovereignty, that of eminent domain, and of a virtual monopoly, in the transportation of freight and passengers, and in return therefor stipulates for the performance of those duties by the corporation. The corporation have no more right in equity and justice to transfer their obligations to other companies, or to natural persons, than the state has to withdraw them altogether": Redfield on Railways, 422, note 14.

The doctrine, according to Judge Redfield, rests upon the ground that the corporation is under an obligation to the state to build and operate its road. Such was formerly the rule in England, even as to a railway corporation that had not made any express undertaking to that effect, and to which no exclusive privileges had been granted: Redfield on Railways, sec. 192. But concerning that class of cases, the doctrine seems to have been overruled in England, and has never prevailed in America: *Id.*, sec. 192, and notes. The appellant did not expressly undertake to build the road authorized by its charter; nor did its charter expressly declare that it should do so; nor was any exclusive right to do so conferred upon it. In our opinion, the appellant was not bound to commence the road, nor to complete it after commencing, nor to put it in operation after completion, nor to continue it in operation. It might have forfeited its charter by nonuser, but was not bound to use it. So long as it shall avail itself of the privileges conferred by its charter, it will be liable to the burdens thereby imposed. But in our opinion, neither the public nor any individual not connected with it can compel it to exercise its corporate franchises, or make it pay damages for failing to do so. The doctrine under consideration has, therefore, no foundation in this case, if the ground on which it rests is earnestly stated by Judge Redfield. Nor do we perceive any other solid ground on which to place it.

We do not suppose that the appellant could mortgage its corporate existence, or any prerogative franchise conferred

upon it. But the right to build and use a railroad is not a prerogative franchise. It has, indeed, been said that "both currency and internal communication between different portions of the state are exclusively the prerogatives of sovereignty": Redfield on Railways, 23; and that "the right to build and use a railroad, and take tolls or fares, is a franchise of the prerogative character, which no person can legally exercise without some special grant of the legislature": Id. 23, note 1. Possibly these passages were not designed to mean more than this: A road cannot be made over the lands of unwilling proprietors except under authority from the state; and the state, in order to encourage internal improvements, may grant to a corporation or individual the exclusive right to build a road between two points. In the absence of any positive law upon the subject, our opinion is that an individual has as much right to build a railroad over his own land, or the land of others with their consent, as he has to build a stage or a wagon; and as much right to use the former as the latter in carrying freight and passengers for pay.

The denial of the right of a railroad corporation to transfer its road has sometimes been based upon considerations of general convenience and public interest, and upon the ground that the corporation, having been chosen by the legislature as the fit depositary of the right to construct and operate the road, should not be permitted to transfer it to irresponsible parties. To this argument several objections present themselves. The appellant's directors, in authorizing this mortgage to Metcalfe, declared themselves "satisfied that to furnish and complete the road they will require the sum of thirty thousand dollars in addition to the means at their command." Assuming, as we must do, that the loan was necessary to complete the road, and assuming it to be probable, as we may do, that the loan could not have been effected without a mortgage, considerations of general convenience seem to be on the side of the power to make the mortgage rather than against it.

The public had an interest in seeing the road constructed and operated according to the terms of the charter. But whether it shall be thus operated by A or B, by an individual or corporation, does not seem to be a matter of any interest whatever to the public. Under the charter of the appellant, its road, while held by it, is under the control of its stockholders. A single person, by purchasing all the stock, can control the road as completely as if he owned it individually. A pur-

chaser under its mortgage would take the road subject to the terms of the charter designed to protect the public, and would be bound thereby as fully as the corporation is.

We perceive no reason to suppose that a purchaser of all the property of appellant would be less responsible in a pecuniary point of view than the appellant. Nor do we perceive any other reason to suppose that the individual responsibility of the purchaser would not be quite as beneficial to the public as the corporate responsibility of the appellant. General convenience requires that the appellant shall in some manner be compelled to pay the money it borrowed. But it is contended that this should be done by merely subjecting the accruing profits. To do that effectually, it might be necessary to appoint a receiver to take charge of the road, because under the management of the directors it is possible that no profits might accrue, while under a different management the road might be profitable. Yet every argument against allowing the appellant to mortgage its road applies with equal force against the appointment of a receiver to control it, with perhaps the additional argument that a receiver would not be personally liable, like a purchaser, as a common carrier.

That a mortgage by a railway company to secure money borrowed for the construction of its road is not opposed to the public policy of this state, is indicated by the general course of legislation upon the subject. We believe that all the railroads in the state, except that of the appellant, were constructed under charters authorizing such mortgages; and mortgages made by the Covington and Lexington company, and by the Lexington and Big Sandy company, without express authority either to make a mortgage or to borrow money, were afterward ratified by the legislature. And we are not aware of an instance in which the legislature, when applied to, has refused to confer such power or to ratify the exercise of it.

The facts that the appellant voluntarily mortgaged its property to secure the money which it was expressly authorized to borrow, and that the bond-holders invested their money upon the faith of the mortgage, furnish, in our opinion, a sufficient distinction to relieve this case from the operation of the distinction in the case of *Winchester and Lexington Turnpike Co. v. Vimont*, 5 B. Mon. 1, in which it was held that a turnpike road could not be sold for a general debt of the corporation.

If the decision in that case could be regarded as denying that property or franchises, in the use of which the public have an interest, can be assigned, we might perhaps hesitate to follow it, in view of several other decisions of this court. In *Jouitt v. Lewis*, 4 Litt. 160, the vendee of a turnpike road was held liable upon his covenant to keep it in repair without any question being made as to the validity of the sale. In *Trustees of Maysville v. Boon*, 2 J. J. Marsh. 227, a ferry franchise was held to be alienable. And in *McCauley v. Givens*, 1 Dana, 261, a lease of a ferry under an order of court was held to be valid. Our decision rests upon the ground that the appellant, having been authorized to borrow this money, had implied power to execute a mortgage to secure its payment. The American decisions cited in *Pierce on Railroad Law*, c. 20, and *Redfield on Railways*, sec. 235, note 19, present such a conflict of opinion that we have felt free to consider the question as an open one, and have not deemed it advisable to attempt to sustain our opinion by referring to cases which are perhaps counterbalanced by opposing authorities.

It is contended that the mortgage of the "railroad with all its rights and privileges" was not authorized by the resolution of the directors which authorized a mortgage of "the road and its property, etc."

Lord Coke, in speaking of "etc." as used by Littleton, says that "it doth imply some other necessary matter": Com. 17 a. In our opinion, the directors must be regarded as having used it for some purpose. Perhaps no effect could have been given to it if there had been several matters, to either one of which it might possibly have been designed to apply. But the appellant held nothing except its road and other property and its franchises. There was nothing to which the phrase "etc." could have been designed to apply except the franchises, and we therefore regard it as having been used to embrace them.

Moreover, as the object was to secure the mortgage debt, and as the road would be of little or no value without the right to use it as a railroad, our opinion is, that the directors, in authorizing a mortgage of the road and its property, must have designed a transfer of the right to operate the road.

6. It is contended that though the mortgage is valid, no sale should be ordered until the principal of the bonds shall fall due. In discussing the first question above considered, we recited the condition of the mortgage concerning the sale of the property. It authorizes a sale, upon the failure to pay

either the interest or principal, "to satisfy the amount claimed and due." There is no provision that the principal shall become due upon a failure to pay interest. The principal is not due, and until it shall become due the appellant will have no right to pay it, and the bond-holders can have no right to insist on payment of it by foreclosure or otherwise. But they have a right to a sale for the interest due. If the property was divisible, it would be proper to order a sale of only so much as might satisfy the amount due. But it is not susceptible of division, and must, therefore, be sold or leased as an entirety: *Caufman v. Sayre*, 2 B. Mon, 208, 209; *Bank of Ogdensburgh v. Arnold*, 5 Paige, 40; *Walker v. Hallett*, 1 Ala. 393. As it seems probable that the property is worth much more than the amount of the debt and interest, our opinion is, that if the appellant prefers that course to be taken, the property should be leased by public auction for the shortest term that will bring the amount due and the accruing interest and principal as the same shall become due. If no one will take it for a term of years, then it should be sold absolutely. The appellant should have an opportunity to elect whether or not the property shall be offered in the first instance for a term of years. The lessee or purchaser should be required to give bonds with good security, personal or real, to be approved by the court, for the purchase-money, including the accruing interest and principal of the mortgage bonds, and a lien on the property or term should be reserved as additional security.

If the property should be leased, the lessee should be required to give a covenant, with good security, to be approved by the court, to keep in good repair the road, cars, and other property not consumable by use, such as fuel and oil, and to return the same to the appellant at the end of the term in as good condition as it may be in when received; and to prevent future controversy with reference thereto, the court before ordering a lease should cause an inventory to be made by one or more commissioners of said property, its value, condition, etc., which should be filed in the cause and be declared in the decree ordering the lease, to be conclusive evidence of the condition and value of said property at the time of the lease.

We need not consider the question made by appellant's counsel as to the failure of the appellee to show that the mortgage was under the seal of the corporation, as the appellant by an entry of record in this court has waived the error, if any, with reference thereto.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

WHEN TRUSTEE MAY SUE IN HIS OWN NAME: *Harney v. Dutcher*, 55 Am. Dec. 131, and note 133.

PUBLIC CORPORATION, WHAT IS: *Tinsman v. Belvidere etc. R. R. Co.*, 60 Am. Dec. 565, and note 580.

PRIVATE CORPORATION, WHAT IS: *Yarmouth v. North Yarmouth*, 56 Am. Dec. 605.

CORPORATE CHARTER, HOW CONSTRUED: See *Mayer etc. v. Baltimore etc. R. R. Co.*, 48 Am. Dec. 531, and note 539.

CORPORATION HAS ONLY SUCH POWERS as are granted in its charter, and such as are necessary to carry into effect the powers expressly granted: *Abby v. Billups*, 72 Am. Dec. 143, and note 148.

RIGHT OF RAILROAD TO TAKE PRIVATE PROPERTY FOR ITS USE: See *Mc- field T. B. Co. v. Hartford etc. R. R. Co.*, 42 Am. Dec. 716, and note 728; *Whitman's Executrix v. Wilmington etc. R. R. Co.*, 33 Id. 411, and note 422.

POWER OF RAILROAD TO MORTGAGE ITS PROPERTY: *Coe v. Columbus etc. R. R. Co.*, 75 Am. Dec. 518, and note 548.

RAILROAD COMPANY CANNOT MORTGAGE its corporate existence: *Coe v. Columbus etc. R. R. Co.*, 75 Am. Dec. 518, and note 548.

POWER OF RAILROAD TO MORTGAGE or pledge its franchise to maintain or operate its road: *Coe v. Columbus etc. R. R. Co.*, 75 Am. Dec. 518, and note 549, citing the principal case.

ALTHOUGH PUBLIC HAS INTEREST in seeing a projected railroad constructed and operated according to its charter, it is a matter of no interest to such public whether it is operated by an individual or by a corporation, and an interested party cannot complain of the mode adopted, so long as it is beneficial: *Louisville etc. R. R. Co. v. Covington*, 2 Bush, 530, citing the principal case.



**CASES**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**OF**  
**MAINE.**

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**SYMONDS v. HARRIS.**

[51 MAINE, 14.]

**REGULAR AND DEFECTIVE RETURN OF LEVY ON REAL ESTATE, IF CURED BY AMENDMENTS duly and properly allowed by the court, is binding upon the parties to the levy.**

**LEVY ON REAL ESTATE IS NOT DEFECTIVE BECAUSE APPRAISEMENT OF UNDIVIDED PORTION set off to creditor is not made at the same rate at which the whole estate is appraised, if the statute does not, in such cases, require appraisement of the whole estate, for the latter being unnecessary must be treated as surplusage.**

**TENANT IN COMMON CANNOT MAINTAIN TRESPASS where his co-tenant appropriates the proceeds or income of the estate.**

**TENANT IN COMMON MAY MAINTAIN TRESPASS where his co-tenant practically destroys the estate itself or some portion thereof.**

**DENEVERANCE AND REMOVAL BY TENANT IN COMMON OF MACHINERY WHICH CONSTITUTES FIXTURES OF MILL owned in common, and the incorporation thereof into another mill which is the sole property of such tenant in common, without the consent of his co-tenant, is a practical destruction of the common property, and his co-tenant may maintain trespass against him.**

**MACHINERY OF SASH-AND-BLIND FACTORY, WITHOUT WHICH IT CANNOT BE OPERATED, and attached to the mill by spikes, nails, bolts, and screws, and operated by belts running from permanent horizontal shafting driven by a water-wheel under the mill, constitutes fixtures of the mill.**

**TRESPASS *quare clausum* for the removal of the machinery of a mill. The case was withdrawn from the jury to be submitted to the full court for a decision upon the law and the facts. The opinion states the case.**

***Howard and Strout*, for the plaintiffs.**

***E. and F. Fox*, for the defendants.**

By Court, RICE, J. Trespass *quare clausum*. The estate was originally the sole property of Thomas Harris. On this estate, which consisted of a mill privilege and a mill called the sash-and-blind factory, with the machinery therein, the plaintiff and also one George Blake, on the 16th of December, 1858, had caused executions, which they severally held against said Harris, to be levied. On these executions certain undivided portions of the estate were assigned to each of said execution creditors. It is admitted that the levy of Blake was invalid, thus leaving that portion of the estate seized by him, on his execution, still in Harris. Assuming the levies of the plaintiffs to be valid, Harris would be a tenant in common with them in the estate.

It is, however, objected that the levies of the plaintiffs are invalid, first, for the reason that the original return of the officer is insufficient in law to bar the estate. There was, undoubtedly, an informality in the original return of the officer. These defects, however, were cured by the amendments which have been duly and properly allowed by the court, and which are binding upon the parties to this suit: *Whittier v. Vaughan*, 27 Me. 301.

Further, it is objected that these levies, or a portion of them, are fatally defective in this, that the appraisers, in their certificates, which were made part of the officer's return, appraised the entire estate at a given sum (\$1,050), but did not appraise the undivided portion thereof, which was taken to satisfy such execution, at the same rate at which they had appraised the whole estate. Or in other words, that the sum at which the several parts were appraised is not equal to the appraisal of the whole.

By section 9, chapter 76, of the Revised Statutes, where the premises consists of a mill, mill privilege, or other estate, more than sufficient to satisfy the execution, which cannot be divided by metes and bounds without damage to the whole, an undivided part of it may be taken, and the whole described.

By section 2 of the same chapter, the appraisers are to be sworn faithfully and impartially to appraise the real estate to be taken, etc.

Now, while the statute, in such case, requires the whole estate to be described, it does not require it to be appraised, nor are the appraisers sworn to appraise the whole. They are, however, sworn to appraise the part taken to satisfy the execution. The appraisal of the whole estate was, therefore,

unnecessary and irrelevant, and must be treated as surplusage: *Winsor v. Clark*, 39 Me. 428.

It is also contended that if the parties are tenants in common, this action cannot be maintained, because the defendants' possession, in such case, must be deemed to be the possession of all the co-tenants, and in subordination to their title. Such, undoubtedly, is the general rule of law. But to this general rule there are exceptions, as where one tenant in common destroys the common property, or so conducts with reference to it as to effect a practical destruction of the interest of his co-tenants therein.

There is a manifest distinction between the cases in which one tenant in common appropriates the proceeds, such as the rents, profits, or income of the estate, and where he practically destroys the estate itself or some portion thereof. In the latter class of cases trespass may be maintained by the injured co-tenant; in the former it cannot.

Thus it was held in *Blanchard v. Baker*, 8 Me. 53, that the diversion of the water in a stream from a mill owned in common and entitled to the natural flow of the stream, and the appropriation of such water to the sole use of a mill owned by a part of the co-tenants, was such a destruction of the common property as would support an action of trespass on the part of the co-tenants who were injured thereby.

So, too, in the case of *McDonald v. Trafton*, 15 Me. 225, it was decided that the demolition of the mill by one co-tenant, and the appropriation of the materials of which it was constructed to his sole use, would support an action of trespass therefor by the injured co-tenant.

In the case at bar, it is denied that the property taken was real estate, or if so, that it has been so converted by the defendants as to constitute a practical destruction thereof.

The property taken was machinery used in the sash-and-blind factory, and evidently necessary to its operation as a factory. Without this machinery, then, the mill would cease to be a factory. This machinery was attached to the mill by spikes, nails, bolts, and screws, and was operated by belts running from the permanent horizontal shafting in the mill, which shafting was driven by a water-wheel under the mill, and connected with the main shafting by suitable gearing, etc.

Such machinery, thus situated and connected, constitutes fixtures and becomes a part of the mill or factory, and its unauthorized disseverance and removal, and the subsequent

incorporation thereof into another mill, the sole property of the defendants, is, in our opinion, a practical destruction of the common property, within the letter and spirit of the case above cited. The action is therefore maintained.

Defendants defaulted, damages to be determined as per agreement.

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**TRESPASS BY TENANT IN COMMON AGAINST HIS CO-TENANT, WHEN LANE:** See *Walt v. Richardson*, 78 Am. Dec. 622, and note 626; what constitutes ouster by tenant in common: *Warfield v. Lindell*, 77 Id. 614, note 623; *Lawson v. Adams*, 74 Id. 59.

**FIXTURES, WHAT CONSTITUTE:** See *Wadleigh v. Janerin*, 77 Am. Dec. 783, and note 788; machinery: See *Richardson v. Copeland*, 66 Id. 424, note 426, 427.

**AMENDMENT OF RETURN OF PROCESS:** See *McArthur v. Carris's Adm'r*, 76 Am. Dec. 529; *Fairfield v. Paine*, 41 Id. 357, and cases cited in the note 363; *Miller v. Alexander*, 65 Id. 73, and note 78.

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## JORDAN v. STEVENS.

[51 MAINE, 78.]

**LEASE OR DEED NOT TO TAKE EFFECT UNTIL FUTURE DAY** is not for that reason void, according to the well-settled law of Maine.

**"MISTAKE" IN STATUTE CONFERRING JURISDICTION IN EQUITY IN CASES OF MISTAKE**, if not in terms limited to mistakes of fact, may be presumed to have been used as it is generally understood in equity.

**RELIEF WILL NEVER BE GRANTED MERELY ON ACCOUNT OF MISTAKE OF LAW**, but there are cases where there are other elements not in themselves sufficient to authorize the court to interpose, but which, combined with such a mistake, will entitle the party to relief.

**TWO FACTS HAVE BEEN FOUND IN ADDITION TO MISTAKE OF LAW** in nearly all cases where relief has been granted; namely, that there has been a marked disparity in the position and intelligence of the parties, so that they have not been on equal terms; and that the party obtaining the property persuaded or induced the other to part with it, so that there has been "undue influence" on the one side and "undue confidence" on the other.

**COMPROMISES MADE UNDER MISTAKE OF LAW ARE UPHOLD IN EQUITY**; but if the parties are not on equal terms, and one misleads the other, and obtains property thereby, against right and equity, as well as against law, he will be compelled to restore it.

**EQUITY WILL, IF POSSIBLE, RESTORE BOTH PARTIES TO SAME CONDITION AS BEFORE**, where they have acted under a mistake of law, though there be no actual fraud, if one is unduly influenced and misled by the other, to do that which he would not have done but for such influence, and he has, in consequence, conveyed property to the other without any consideration, or purchased what was already legally his own.

**BILL in equity.** The cause was heard on bill, answers, and proofs. The opinion states the case.

*Howard and Strout*, for the complainant:

*E. and F. Fox*, for the respondents.

By Court, DAVIS, J. Jonathan Stevens, the father to the parties to this suit, died in November, 1857, leaving personal property valued at about three thousand dollars, and real estate worth nearly five thousand dollars. The plaintiff, being a widow, had worked in his family for many years, receiving therefor one dollar a week. A short time before his death he gave her a life lease of his homestead in Portland, worth about two thousand dollars, to take effect upon his decease. Whether he did this for the reason that he thought that he had not paid her enough for her services, or because she needed a larger share of the property than the other heirs, does not appear, and is immaterial. He died intestate, leaving seven children, and the issue of another not living.

The property leased to the plaintiff was described as situated "on Chestnut Street." After the death of the father, the plaintiff had the lease altered so as to read "Wilmot Street." This was done at the suggestion of some of the defendants. And besides, as the property was otherwise sufficiently described, the mistake of the street did not affect the lease, and the alteration was immaterial.

It is contended that the lease was void, because it was not to take effect until a future day. But whatever may have been supposed to be the law in regard to the validity of deeds to take effect *in futuro*, it is now well settled in this state that such deeds are not for that reason void: *Wyman v. Brown*, 50 Me. 139.

But some of the defendants thought the lease to the plaintiff was invalid, and so informed her. Taking their testimony as true, which we do not question, they did not intentionally deceive her on this point. They actually thought there was a defect of which they could take advantage. She was unlearned in every respect, not being able to write her own name. It is evident that she put confidence in them, believing them to be better informed than herself. And supposing, from their representations, that her title to the homestead, by the lease, had failed, she was induced by them to relinquish all her interest in the whole estate of her father, in consideration of a new life lease from them of the same property embraced in her first lease.

One eighth of the estate, subject to her life interest in the homestead, must have been worth nearly or quite eight hun-

never hesitated to compel its restoration, though both the parties acted under a mistake of the law. And there would be still stronger reasons for granting relief in such a case, if the party from whom the property had been obtained had been led into his mistake of the law by the other party: *Sparks v. White*, 7 Humph. 86; *Fitzgerald v. Peck*, 4 Litt. 127.

Thus in *Pickering v. Pickering*, 2 Beav. 31, Lord Langdale set aside certain agreements entered into under a mistake of the law, on the ground that "the parties were not on equal terms"; and that the plaintiff acted under the influence of the defendant. And the same thing was done in *Wheeler v. Smith*, 9 How. 55, because the parties "did not stand on equal ground"; and the plaintiff "did not act freely, and with a proper understanding of his rights."

This question has arisen more frequently in cases where parties have been mistaken in regard to their titles to real estate. Thus in *Bingham v. Bingham*, 1 Ves. Sr. 126, the defendant sold to the plaintiff property which he already owned: and the court compelled a restoration of the purchase-money. It may have been, as Bronson, J., suggests in *Champlin v. Laytin*, 18 Wend. 407 [31 Am. Dec. 382], on the ground that the defendant "misled" the plaintiff in regard to his title. But the correctness of the decision is not questioned by Lord Cottenham, in *Stewart v. Stewart*, 6 Clark & F. 964.

Judge Story suggests that such a case "seems to involve, in some measure, a mistake of fact, that is, of the fact of ownership, arising from a mistake of the law": 1 Story's Eq. Jur., secs. 122, 130. And in *King v. Doolittle*, 1 Head, 77, the decision is put on that ground. But if all the other facts are agreed and known to the parties, the question of "ownership" can be nothing but one of law. And in such cases, as in others, courts of equity should not interfere, unless it appears that there was a difference in the condition of the parties, so that, instead of both acting voluntarily, one was misled or unduly influenced by the other. Nor will the court then interpose, in the absence of fraud, unless the defendant, as well as the plaintiff, can be restored substantially to the same situation as before: *Crosier v. Acer*, 7 Paige, 137.

Nor where there is a real controversy between parties, and the case is one of any doubt, will the court set aside a compromise fairly made by them, though it should afterwards appear that one has thereby received property to which he was not legally entitled: *Steele v. White*, 2 Paige, 478; *Trigg v*

*Reed*, 5 Humph. 529 [42 Am. Dec. 447]. On the contrary, courts of equity encourage such compromises. But here, too, as in other cases, if the parties are not on equal terms, and one misleads the other, and obtains property thereby against right and equity, as well as against law, he will be compelled to restore it. "If a party acting in ignorance of a plain and settled principle of law," says the vice-chancellor, Sir John Leach, "is induced to give up a portion of his indisputable property under the name of a compromise, a court of equity will relieve him from the consequences of his mistake": *Naylor v. Winch*, 1 Sim. & St. 564. And though this was a *dictum*, the principle was fully applied by the supreme court of the United States in *Wheeler v. Smith*, 9 How. 55, previously cited. And the same doctrine has been recognized by this court in the case of *Freeman v. Curtis*, 51 Me. 140 [post, p. 564]. And in both of these cases relief was granted, not on the ground that a mistake of the law alone entitles one to relief, but that, though there be no actual fraud, if one is unduly influenced and misled by the other to do that which he would not have done but for such influence, and he has in consequence conveyed to the other property without any consideration therefor, or purchased what was already legally his own, the court will, if it can be done, restore both of the parties to the same condition as before.

The case at bar is one of this kind. The parties were not on equal terms. The plaintiff was ignorant in business affairs, as well as in other respects. Having confidence in the defendants, she relied upon what they told her. It does not appear that she doubted the validity of her father's lease to her until such doubts were communicated to her from them. The proposition for her to release her interest in all the other property did not originate with her, but with them; and she was induced to accept it by the fear which they had impressed upon her, that she otherwise would have to give up the homestead. She acted under their influence. They believed that there was a defect in the first lease, and they meant to take advantage of it. As was said by the master of the rolls, afterwards Lord Kenyon, in *Evans v. Llewellyn*, 1 Cox, 333, "though there was no fraud, there was something like fraud; for an undue advantage was taken of her situation. The party was not competent to protect herself; and therefore this court is bound to afford her such protection."

The bill is sustained, with costs. And the defendants must



be decreed to pay her a distributive share of the personal estate, with interest from the time of distribution, making her equal with them, and to release to her one eighth of all the real estate, and account to her for her share of the rents and profits of the portion not occupied by her.

APPLETON, C. J., and KENT, WALTON, and DICKERSON, JJ., concurred.

RELIEF WILL NOT BE GRANTED FROM MISTAKE OF LAW, unless there are special circumstances, such as undue influence, misrepresentation, or misplaced confidence: *Boggs v. Fowler*, 76 Am. Dec. 561, and note 567; *Freeman v. Curtis*, *post*, p. 564; see *Goodenow v. Hoer*, 76 Id. 540, note 550.

DEED OF FREEHOLD TO COMMENCE IN FUTURO is void at common law: Note to *Gant v. Hunsucker*, 55 Am. Dec. 414; *Babb v. Harrison*, 70 Id. 201.

## BARNES v. UNION MUTUAL FIRE INSURANCE CO.

[51 MAINE, 110.]

ANY MATERIAL CHANGE IN TITLE, THOUGH NOT BY ALIENATION, will avoid insurance policy which provides that any alteration or change in the title shall avoid it.

POLICY OF INSURANCE ON UNDIVIDED HALF OF BUILDINGS, providing that it shall be void "when the title of any property insured shall be changed by sale, mortgage, or otherwise," becomes void upon partition of the premises made on a judgment therefor rendered on the petition of the co-tenant of the insured.

POLICY OF INSURANCE ON BUILDINGS AND FURNITURE THEREIN IS INDIVISIBLE, and if made void by the assured as to any of the items of property insured, the whole policy is void; therefore where the policy is avoided by a change of title to the buildings, recovery cannot be had for the loss of the furniture.

ACTION on a policy of insurance; reported from *nisi prius*. The opinion states the case.

*F. O. J. Smith*, for the plaintiff.

*T. M. Hayes*, for the defendants.

By Court, DAVIS, J. The plaintiff applied for insurance on "one half, in common and undivided," of certain buildings, and household furniture therein. In answer to the question, "Who owns and occupies the buildings?" he answered: "The applicant owns and occupies the property." A fair construction of this representation of title is, that the applicant was the owner of an undivided half of the property described, and

the sole owner of the property to be insured. This representation was true.

The by-laws of the company are expressly made a part of the policy, as conditions of the insurance. By the sixteenth article it is provided that "when the title of any property insured shall be changed, by sale, mortgage, or otherwise, the policy shall thereupon be void."

The insurance in this case was for six years. The policy was dated November 15, 1851. Upon a petition for partition, duly prosecuted by the other tenant in common, upon which judgment was rendered January 20, 1857, the premises were divided, and the plaintiff became the owner of a particular half thereof, in severalty. The buildings were destroyed by fire April 1, 1857.

The partition of the property may not have been an alienation, as understood in matters of insurance. But when a by-law provides that any alteration or change in the title shall make the policy void, any material change in the title will have that effect, though it is not by an alienation: *Edmands v. Mutual Safety Fire Ins. Co.*, 1 Allen, 311 [79 Am. Dec. 746]; *Campbell v. Hamilton Mut. Ins. Co.*, 51 Me. 69.

The title in the case at bar was materially changed by the partition. The effect was equivalent to an alienation and a purchase. The plaintiff no longer owned any interest in the entire property, while he did own the entire interest in a part of it. It was the same as if he had given his co-tenant a deed of his interest in a specific part, and had received from him such a deed of the other part. His title no longer corresponded with the policy, in nature or quantity. He insured but one undivided half of the part which he owned after it was divided. And after the division, he owned no part of the other half. If he could recover at all, which he cannot do, it would be for only one fourth part of the whole, or for an undivided half of the part which he continued to own after the partition.

The furniture was separately valued in the policy, and it is claimed that the plaintiff is entitled to recover for the loss of that, if he fails to recover for the loss of the buildings. But the provision in the by-laws is that if the title is changed the policy shall be void. And besides, it has been decided by this court that such a contract of insurance is indivisible, and if rendered void by the assured in any of the items of property insured, the whole policy is void: *Lovejoy v. Augusta M. F. Ins.*

*Co.*, 45 Me. 472; *Gould v. York County Mut. Fire Ins. Co.*, 47 Id. 403 [74 Am. Dec. 494]; *Day v. Charter Oak Ins. Co.*, 51 Id. 91.

Plaintiff nonsuit.

APPLETON, C. J., and KENT, WALTON, and DICKERSON, JJ., concurred.

KENT, J., held that the representation of the plaintiff, as to occupancy of the building, was either a misstatement or a concealment of a material fact.

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POLICY OF INSURANCE VOID AS TO PART OF PROPERTY, WHETHER VOID IN TOTO: *Gould v. Mutual Fire Ins. Co.*, 74 Am. Dec. 494, and note 498-500. In *Allison v. Phoenix Ins. Co.*, 3 Dill. 486, the principal case is cited upon the question of the entirety of a policy of insurance, and whether if avoided as to part of the property insured it is invalidated altogether; and the soundness of the principal case in this particular is doubted, but the court renders no decision on the proposition.

ALIENATION OR CHANGE OF TITLE WHICH WILL AVOID POLICY OF INSURANCE: See *Young v. Eagle Fire Ins. Co.*, 74 Am. Dec. 673; note to *Morrison's Adm'r v. Tennessee M. & F. Ins. Co.*, 59 Id. 299. A dissolution of partnership and a sale by one partner of his interest to his co-partner will avoid a policy of insurance upon partnership property, containing a condition that the policy shall be void if the property be alienated by sale or otherwise: *Finley v. Lycoming County Mut. Ins. Co.*, 72 Id. 705, note 708. The principal case is cited to the point that assignments and receiverships pass title, and therefore such proceedings are a change and alienation of the property which work a forfeiture of an insurance policy: *Keeney v. Home Ins. Co.*, 3 *Thomp. & C.* 482.

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## FREEMAN v. CURTIS. SWETT v. CURTIS.

[51 MAINE, 140.]

MONEY PAID OR PROPERTY TRANSFERRED UNDER MISTAKE OR IGNORANCE OF LAW, with full knowledge of the facts, and in the absence of fraud, cannot be recovered back at law or in equity, the rule being equally stringent in both jurisdictions.

WHERE MISTAKE IS ONE BOTH OF LAW AND FACT, though the latter is the result of the former, relief will be granted when justice and equity require it.

RECONVEYANCE OF REAL ESTATE CONVEYED UNDER MISTAKE OF LAW, AND CONSEQUENT MISTAKE OF FACT, will be decreed where there was no consideration for the conveyance, the means used to obtain it were improper, and the grantee of the property ought not in good conscience to retain it.

HEIRS WHO CONVEY THEIR INTERESTS IN ESTATE TO ANOTHER UNDER IGNORANCE OF LAW of descent, and a consequent mistake of fact that they are not the only heirs, will be decreed a reconveyance in equity, where the grantee, who had no legal interest in the estate, represented

that it was doubtful whether they were the only heirs, and exhibited deeds from other persons, claiming to be heirs, conveying their interests in the estate to him, the better to enable him to contest a will which disposed of a portion of the property to strangers, he at the same time executing an agreement to pay them out of the proceeds of the estate their several shares; and upon this showing, the plaintiffs, in ignorance of their sole heirship, and without any consideration, conveyed to him their interest in the estate, receiving in return an agreement to pay them each one twelfth or in all one sixth of the proceeds of the estate; and a reconveyance should be decreed whether or not the grantee was aware of the sole heirship of the plaintiffs, because, if so, his action was fraudulent; and if not, then the means used to obtain the conveyance were improper, no consideration was paid, and he ought not in good conscience to retain the property.

**BILLS in equity.** The cases were heard on bills and answers. The opinion states the case.

*P. Eastman and Son, and T. M. Hayes*, for the complainants.

*Bourne, Sen.*, for the respondent.

By Court, DAVIS, J. As these cases are in all respects alike, we may refer to them as one.

They are each presented to the court upon the bill and answer. The answer is therefore to be considered as true; and no part of the bill is to be considered true which is denied by the answer. Applying this rule, we gather the following statement of facts:—

Hannah O. Curtis, of Wells, died January 29, 1861. Although she left a will, the validity of which is denied in the answer, the principal controversy relates to a large portion of her property not disposed of thereby. This descended to her heirs at law. As she left no lineal descendants, nor any husband, nor father, nor mother, nor brother, nor sister, the plaintiffs, being an uncle and an aunt, a brother and sister of her mother, are her heirs.

There are also several cousins of the deceased, who are the descendants, in another line, of her grandfather, Samuel Curtis. One of these is the defendant. It is not claimed that they are her heirs.

After the death of Hannah O. Curtis, the defendant at once began to interpose in the settlement of the estate, as if he had been one of the heirs. He went to the plaintiffs and “informed them that Hannah O. Curtis was dead.” As they lived in York, and she died in Biddeford, they probably did not know

it until so informed. He also informed them that she left a will, signed, as he believed, "when she was of unsound mind."

He also admits that he represented to them that the deceased left estate not disposed of by the will; that he had been informed by some that it would descend and be distributed equally to her cousins,—by some that it would belong to the cousins who were the descendants of Samuel Curtis, and by others that the uncles and aunts would be entitled to the whole; that the descendants of Samuel Curtis ought, in justice, to receive one half of the estate; "that the defendant was willing to make that distribution if the plaintiffs were"; and that they consented thereto.

He also exhibited to them several deeds, given by Joseph Curtis and others, to him, "of all their interest in said estate," he giving back to them an agreement to pay them a specified portion of the amount he should realize out of it. Thereupon they assented to his proposition, gave him deeds of all their interest in the estate, and he gave to them an agreement to pay them each one twelfth part of the amount realized from it.

They now claim that their deeds were obtained by the fraudulent or improper conduct of Curtis, the defendant, and were given under a mistake in regard to their rights. They therefore pray that he may be compelled to reconvey to them.

It is urged by the counsel for the defendant that the plaintiffs must have known their relationship to the deceased, and that if there was any mistake on their part, it was a mistake of law, and not of fact. And it is contended that against such a mistake equity will afford no relief: 1 Story's Eq. Jur., secs. 111, 113.

The same rule is applicable in equity as in actions at law to recover back money paid, which is an equitable action. And whenever money can be recovered back at law, on the ground that it has been paid by mistake, other property may be recovered back at law or in equity: *Moore v. Mandlebaum*, 8 Mich. 433.

The general rule is the same at law as in equity, that in the absence of fraud, money paid under a mistake, or through ignorance of the law, with the knowledge of all the facts, cannot be recovered back: *Norton v. Marden*, 15 Me. 45 [32 Am. Dec. 132]; *Peterborough v. Lancaster*, 14 N. H. 382; *Elliott v. Swartwout*, 10 Pet. 137. But this was said by Morton, J., in *Haven v. Foster*, 9 Pick. 112 [19 Am. Dec. 353], to be a vexed question. The rule is at least subject to some exceptions. And it

has been held in many cases that though there has been no actual fraud, if there has been any improper conduct on the part of the payee, or if he ought not in good conscience to retain it, money paid to him under a mistake of the law may be recovered back: *Silliman v. Wing*, 7 Hill, 159; *Northrop v. Graves*, 19 Conn. 548 [50 Am. Dec. 264]; *Renard v. Feidler*, 8 Duer, 318; *Covington v. Powell*, 2 Met. (Ky.) 226; *Culbreth v. Culbreth*, 7 Ga. 64 [50 Am. Dec. 375].

The rule is quite as stringent in equity as in suits at law. If relief is ever granted for a mistake of law, it is an exception, depending upon the particular circumstances of the case: *Hunt v. Rousmaniere*, 1 Pet. 1, 15. And yet the rule is not imperative. "A mistake of law is not ordinarily a ground of relief in equity": *Mellish v. Robertson*, 25 Vt. 603. But it never has been decided "that a plain and acknowledged mistake in law is beyond the reach of equity": Marshall, C. J., in *Hunt v. Rousmanier*, 8 Wheat. 174.

It is very clear, from the answer of the defendant, as well as from the bill, that the plaintiffs were ignorant of the law relating to the descent and distribution of estates; and this ignorance of the law involved them in a mistake of fact, as to who were the heirs of Hannah O. Curtis. And where the mistake is one both of law and fact, though the latter is the result of the former, relief will be granted when justice and equity require it: *King v. Doolittle*, 1 Head, 77.

If the defendant was as ignorant as the plaintiffs, the mistake was mutual. If he was not ignorant, then he knowingly took advantage of their ignorance, and obtained the deeds fraudulently.

He alleges that his father, "Ralph Curtis, in his lifetime, informed him that the estate of Hannah O. Curtis would descend and be distributed among all the cousins"; and that "he fully believed that such was the law of the state." But what information he received, or what he believed, in his father's lifetime, is immaterial. His belief and information, at the time when he obtained the deeds of the plaintiffs, are the matters of importance.

He alleges the truth of what he said to the plaintiffs,—that he had been informed by some persons that the estate would descend to the cousins, and by others that it would descend to the uncles and aunts. But the answer does not disclose when he was so informed. It may have been many years before the death of Hannah O. Curtis that some persons, igno-

rant of the law, had informed him that the cousins would inherit her estate; while there is nothing in his answer inconsistent with the supposition that he had recently been informed by persons learned in the law, consulted by him as counsel, that the plaintiffs were the only heirs. It would have been the most natural course for him to pursue to consult counsel; and as he does not allege his ignorance at that time, we are hardly at liberty to infer it.

It is difficult to understand upon what ground the defendant could have supposed it proper for him to intermeddle with the estate. We cannot avoid the impression that he knew, when he procured the deeds of the plaintiffs, that he had no legal interest in it. But if otherwise, in the most favorable view for him, it was doubtful whether he had any interest. Under such circumstances, why did he undertake to settle the estate? Or why did he proceed on the assumption that he had a legal interest in it? As a prudent man, regarding the rights of others, as well as his own, he would have consulted counsel before doing anything.

Having procured deeds from others, whose interest was as doubtful as his own, he approached the plaintiffs. His representations to them were adapted to give them the impression that their interest was as uncertain at least as his. The exhibition of his deeds from other persons, and the suggestion that the object of conveying all their interests to one was the better "to contest the will," produced the effect which must have been designed. The plaintiffs, without the slightest consideration, conveyed to him the whole estate, receiving nothing in return but an agreement to pay them each one twelfth part of the proceeds. The means resorted to in order to obtain the property were obviously improper; and the defendant ought not, in good conscience, to retain it. It is not a case where one, through ignorance of the law, has settled a claim against him that could not have been enforced; or has entered into a contract for which he has received any consideration. There was nothing between the parties as a basis for any negotiations. There was no claim of the one against the other, valid or invalid. It was an isolated act of obtaining a release of five sixths of a valuable estate, without any pretense of any consideration, through the ignorance of the parties giving it. Whether the defendant was also ignorant or not, it would be a reproach to the law if he could now be permitted to retain the fruits of such a proceeding.



The bills are sustained, with costs for each of the plaintiffs. A decree will be made in each case that the defendant reconvey all the estate conveyed to him. And if any further relief is necessary, it will be granted.

APPLETON, C. J., and RICE, CUTTING, KENT, and WALTON, JJ., concurred.

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MISTAKE OF LAW, WHEN RELIEF GRANTED FROM: See *Jordan v. Stevens*, ante, p. 556, and note.

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## GERRISH v. BROWN.

[51 MAINE, 256.]

RIVER IS PUBLIC HIGHWAY BY LAW OF MAINE, THOUGH NOT NAVIGABLE STREAM, if it is of sufficient capacity to float logs, rafts, etc.

PERSON WHO OBSTRUCTS STREAM WHICH IS BY LAW PUBLIC HIGHWAY, by casting therein waste material, filth, or trash, or by depositing material of any description, except as connected with the reasonable use of such stream as a highway, or by direct authority of law, does so at his own peril. It is a public nuisance, for which he would be liable to an indictment and to an action at law by any individual who should be specially damaged thereby.

MILL-OWNER WHO CASTS SLABS, EDGINGS, OR OTHER WASTE OF HIS MILL INTO RIVER to be floated away by the stream, whereby navigation is obstructed or the rights of private individuals infringed, is liable to an action for damages by a person specially damaged.

TEMPORARY OBSTRUCTION OF PORTION OF STREAM AS INCIDENT TO RIGHT OF NAVIGATION, while preparing materials for transportation or securing them at the termination of their transit, is no violation of law. In this respect public streams are governed by the same general rules of law as are highways upon land.

TEMPORARY SHED OR GUIDE BOOMS, THOUGH OBSTRUCTIONS TO NAVIGATION, MAY BE USED, as incident to the reasonable use of a river for running and securing logs, for the purpose of directing the logs or lumber into proper places in which to detain them for use; but the stream may not be permanently obstructed and converted into permanent places of deposit for logs by the construction of piers and booms.

CASE for damages. The cause was by order of court and the consent of the parties submitted to this court on report to determine whether upon the testimony offered by the plaintiff the action can be maintained. The opinion states the case.

*D. Hammons*, for the plaintiffs.

*Shepley and Dana*, for the defendants

By Court, RICE, J. This case comes before us on a quasi report. It is not presented in conformity with the statute, and might therefore with propriety be dismissed. It however in-

volves questions of much importance, not only to the parties immediately interested, but to many other citizens of the state. For the purpose, therefore, of enabling those interested to adjust matters in controversy intelligently between themselves, or to present the points in issue before a court and jury, we proceed briefly to consider the case as though the facts, which the evidence tended to prove, had actually been established by proof.

It would thus appear that the Androscoggin River at the points whereon the mills of the respective parties are located, and between them, though not technically a navigable stream, is of sufficient capacity to float logs, rafts, etc., or in other words, is a floatable stream, and as such, by the law of this state, is deemed a public highway.

The plaintiffs are owners of a steam saw-mill situated at Bethel, on the bank of said river, which is supplied with logs floated down the stream, and secured by means of piers and booms in that portion of the river which flows between Town's Island and the south shore thereof, and also in a place of deposit, consisting of about four acres of land, owned by them, and upon which logs may be floated at high water. To facilitate the process of catching and securing logs, the plaintiffs have also constructed sheer or guide booms, to be used temporarily, running from the head of Town's Island to Clark's Island, and thence to the north side of the river.

The defendants are the proprietors of an extensive milling establishment at Berlin Falls, some twenty miles above, on the same river, where they manufacture large quantities of lumber, the waste from which they cast into the stream below their mills, to be floated away as it may by the current.

The complaint of the plaintiffs is, that large quantities of this waste material from the defendants' mill comes down upon the stream, intermingled with their logs, runs into their boom, and greatly obstructs the moving of logs therein, and also prevents them from swinging a side-boom on the bank of said river, opposite the place of deposit on their own land, to hold logs for the use of their mill, while the logs of other owners are being passed by.

The question is, whether the plaintiffs, without fault on their part, suffer injury from the unauthorized acts of the defendants. To determine this involves both law and facts. We can now only indicate the rule of law applicable to the case. The facts must be settled hereafter.

The plaintiffs' mill, not being a water-mill, does not fall within the protection of the mill act. No question involving the right of flowage is presented. The question presented involves simply the legitimate use of the river by the parties as a public highway.

This subject, as it bears upon the specific questions at issue between these parties, has very recently received a somewhat extended and careful examination by this court in *Dwinel v. Veazie*, 50 Me. 479.

It was therein decided, with special reference to casting into the water, to be floated away, edgings and other waste materials from saw-mills, that highways, whether on land or water, are designed for the accommodation of the public, for travel or transportation; and any unauthorized or unreasonable obstruction thereof is a public nuisance in judgment of the law. They cannot be made the receptacles of waste materials, filth, nor trash, nor the depositories of valuable property even so as to obstruct their use as public highways. All such obstructions in the eye of the law are deemed unreasonable.

If, therefore, a person obstructs a stream which is by law a public highway, by casting therein waste material, filth, or trash, or by depositing material of any description, except as connected with the reasonable use of such stream as a highway, or by direct authority of law, he does it at his peril; it is a public nuisance for which he would be liable to an indictment, and to an action at law by any individual who should be specially damaged thereby.

A person who should cast at random filth or trash into a dock, or waste materials into a public river, to float or sink as it may, without guidance or direction, can in no just sense be said to be in the use of such dock or river for purposes of navigation. The term "navigation," as applied to waters which are used as highways, imports something different; it denotes the transportation of ships or materials from place to place under intelligent direction or guidance, and not the use of such waters as a mere receptacle of filth, or as a place for the deposit of worthless materials.

If, therefore, the defendants elect to cast the slabs, edgings, or other waste of their mills, into the river, to be floated away by the stream, they do so at their peril, and must see to it that they do not thereby obstruct the navigation of the river, nor infringe upon the rights of private individuals.

So, too, with regard to the plaintiffs. Like other citizens they

may use the river as a highway for purposes of navigation, and as incident to this right of navigation, the temporary obstruction of portions of the river while preparing their materials for transportation or in securing them at the termination of their transit would constitute no violation of law. In this respect, public streams are governed by the same general rules of law as are highways upon land.

A temporary occupation of a street or highway by persons engaged in building, or in receiving or delivering goods from stores or warehouses, or the like, is allowed from the necessity of the case; but a systematic and continued encroachment upon the street, though for the purpose of carrying on a lawful business, is unjustifiable: *People v. Cunningham*, 1 Denio, 524 [43 Am. Dec. 709].

For such purpose, and as incident to the reasonable use of the river for running and securing logs, parties may use temporary sheer or guide booms to direct the logs or lumber into proper places in which to detain them for use: *Dwinel v. Veazie*, 50 Me. 479.

But they are not authorized, by the construction of piers and booms, to convert navigable streams into permanent places of deposit for logs or other materials, so as thereby to obstruct the navigation of such streams or rivers. If the plaintiffs have done so in this case, and have thereby contributed to the production of the injury of which they complain, so far they are remediless, as the court will not interfere, when both parties are acting in violation of law, to determine which is the more culpable.

Whether the plaintiffs have been injured by the unauthorized acts of the defendants, in the enjoyment of structures which they have a right to place upon the river, or in their use of the river as a highway, we are unable to determine from the case reported. We therefore remand the case to the county court, to be tried in conformity with the legal principles above stated, in case the parties shall be unable to adjust their differences without the further interposition of a court and jury.

Case to stand for trial.

APPLETON, C. J., and DAVIS, KENT, WALTON, and DICKERSON, JJ., concurred.

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WHAT CONSTITUTES NUISANCE, AND REMEDY THEREFOR: See *Norcross v. Thoms*, *post*, p. 588, and note; *Davis v. Winslow*, *post*, p. 573. For a public nuisance the remedy is by indictment, and for a private nuisance an action for

damages lies in behalf of the person injured: *Brayton v. Fall River*, 113 Mass. 227, citing the principal case.

**RIGHT OF PUBLIC AND INDIVIDUALS TO USE WATERCOURSES AS HIGHWAYS:** See note to *Davis v. Winslow*, *post*, p. 582. The principal case is cited to the point that a stream which in its natural state is capable of being used for floating logs is a public highway: *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 342.

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## DAVIS v. WINSLOW.

[51 MAINE, 264.]

**ESSENTIAL CHARACTERISTIC OF HIGHWAYS IS THAT EVERY PERSON HAS EQUAL RIGHT** with every other person to their enjoyment.

**EVERY PERSON HAS EQUAL RIGHT TO REASONABLE USE OF NAVIGABLE RIVERS** or public streams as public highways.

**WHAT CONSTITUTES REASONABLE USE OF NAVIGABLE STREAM AS HIGHWAY** depends upon circumstances of each particular case; and no positive rule of law can be laid down to define and regulate such use with entire precision; but regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, necessity, and duration, and the established usage of the country. The size of the stream, also, the fall of water, its volume, velocity, and prospective rise or fall, are to be considered.

**ONE WHO IN USING STREAM AS HIGHWAY**, and in the exercise of ordinary care necessarily and unavoidably impedes or obstructs another temporarily, does not thereby become a wrong-doer, his acts are not illegal, and he creates no nuisance for which an action can be maintained.

**PERSONS ARE NOT LIABLE FOR OBSTRUCTING HIGHWAY**, where the obstruction is temporary and necessary to their reasonable use of it; but in such cases, they must so conduct themselves as to discommode others as little as is reasonably practicable, and remove the obstruction or impediment within a reasonable time, having regard to the circumstances of the case.

**QUESTION OF REASONABLE USE OF RIVER AS HIGHWAY** by defendant having been, by the consent of both parties, submitted to the jury in an action for damages accruing from an obstruction of the river by a boom, whereby plaintiff's logs were detained, this was a waiver by the parties of their right to except to the instructions of the court upon the subject.

**WHAT IS REASONABLE OR DUE CARE DEPENDS ON SUBJECT-MATTER** to which care is to be applied, and the attendant circumstances.

**NEGLECTENCE CONSISTS IN OMITTING TO DO SOMETHING** that a reasonable man would do, or in doing something that a reasonable man would not do, causing, unintentionally, mischief to another.

**IF ONE, FOR HIS OWN BENEFIT, VIOLATES RIGHTS OF ANOTHER**, it is a nuisance, and express malice is not necessary; and if a public right is violated, indictment is the appropriate remedy for its vindication and redress.

**CASE for damages.** Verdict for the plaintiffs, and exceptions by the defendants to the rulings and instruction of the lower court, and motion to set aside the verdict. The opinion states the case.

*Evans and Putnam*, in support of the exceptions.

*E. and F. Fox, and Hammons*, contra.

By Court, DICKERSON, J. Case, to recover damages sustained by the plaintiffs, in consequence of the stoppage and detention of their logs, by means of a boom erected by the defendants across the Androscoggin River, at Milan, in the state of New Hampshire.

It was admitted that the Androscoggin River, at the place in question, was a public highway, capable of and being used for floating logs and timber to market, and that the defendants, being owners of saw-mills at Berlin Falls, in New Hampshire, on said river, erected for their own convenience and the operation of their mills, the boom complained of, and that at or about the time alleged the defendants kept up said boom across said river, and thereby detained logs belonging to the plaintiffs, which were floating down said river, intermingled with logs belonging to the defendants, and thereby prevented said plaintiffs' logs from reaching their destination at Bethel steam-mills so soon as they otherwise would have done, and that thereby the plaintiffs suffered damage.

The case comes before us on exceptions and motion by the defendants. It is conceded that the Androscoggin River, at the place in question, is a public highway, capable of and being used for floating logs and timber to market. While there is no controversy between the respective counsel with regard to the general proposition that obstructions to highways, whether upon the land or water, constitute nuisances which may be abated, the learned counsel for the defendants denies that this proposition is universally true, and argues that in the case at bar it should be applied with limitations and qualifications which arise from the particular circumstances of the occasion.

It is to be observed that general propositions are liable to be very much modified by circumstances; *in generalibus versatur error*. The difficulty oftentimes consists, not in understanding the general rule of law, but in applying it to the ever-varying circumstances of particular cases. While, however, the general principles of the common law remain fixed, their adaptation to the vicissitudes of human affairs renders them sufficiently comprehensive to meet new institutions and states of society, and new systems of intercommunication between man and man, as they unfold themselves in the progress of civilization.

This peculiarity of the common law is, perhaps, nowhere more fully exemplified than in its application to public water-courses. As human society advanced from its primeval state, navigable rivers and public streams came to be the arteries of commerce, permeating parts otherwise inaccessible, developing occult mineral resources, and bearing upon their bosom immense wealth to the more genial abodes of man. The history of our legislature, no less than the decisions of our courts, attest the solicitude of the community to make these great highways both the means of developing the resources of the country and of transporting their products to more remote regions. The various mill acts, for the encouragement of milling, and the vigilance of courts to preserve a free transit for the various raw material and manufactures of lumber to a market, are so many proofs of this truth. "God," says Domat, "has given us the use of the seas and rivers, which opens the communication with all the world, to use, and makes us acquainted with our fellow-men in distant countries."

The essential characteristic of highways is, that every person has an equal right with every other person to their enjoyment, and yet this enjoyment of them by one, of necessity, to a certain extent, interferes with its use by another. Water, air, and light are the gifts of Providence, designed for the common benefit of man, and every person is entitled to a reasonable use of each. A man cannot occupy a dwelling, or consume fuel for domestic purposes, at least in our large cities, without, in some degree, impairing the natural purity of the air; nor can he erect a building, or plant a tree near the house of another, without also, in some respect, diminishing the quantity of light he enjoys. Ordinarily, these, being the necessary incidents to the common enjoyment, furnish no ground of action. The use of water, from its greater specific gravity, and the countless variety of purposes for which it is appropriated, gives rise to a large number of perplexing questions. The detention of water by a dam, for the benefit of a mill, oftentimes results in an injury to the owners of the privilege below. It does not, however, follow that for every such injury there is a remedy. If the detention is indispensable to the owner's reasonable enjoyment of his rights in the common highway, and is continued no longer than is necessary for that purpose, the proprietor below is without a remedy for any injury he may have suffered thereby; otherwise, the right of common use is nugatory, and the party requiring such use is himself ob-



structed in its exercise: *Webb v. Portland Mfg. Co.*, 8 Sum. 189; *Embrey v. Owen*, 4 Eng. L. & Eq. 466.

The social duty, therefore, inculcated in the maxim, *Sic utere tuo ut alienum non lædas*, must be understood, and applied with qualification. In *Inhabitants of Shrewsbury v. Smith*, 12 Cush. 181, which was an action by a town against the owners of a dam which had broken away and injured plaintiffs' bridge, the court defined this maxim to mean, that each proprietor, in exercising his own rights on his own territory, should act with reasonable skill and care to avoid injury to others, and as an approximate rule for measuring that degree, it should be that degree of ordinary skill, care, and diligence, which men of common and ordinary prudence in relation to similar subjects would exercise in the conduct of their common affairs.

Where the legal effect of an act is the subject of judicial investigation, it is not unfrequently necessary to inquire into the subject-matter, occasion, object, extent, and necessity of the act, together with the manner and purpose of its performance. Was the subject-matter appropriate, the object lawful, the occasion suitable, the extent reasonable, the necessity imminent, or the manner prudent? As these questions shall be answered by the facts and circumstances of the particular case, so will be the judicial determination of the legal consequences resulting from the act in question.

Reasonable use is the touchstone to which cases of this description must be subjected, and it becomes important, therefore, to examine the decisions of courts upon this question.

1. Of the use of water by riparian proprietors.

In Pennsylvania, the question arose with regard to the respective rights of the upper and lower riparian proprietors to the use of water for milling purposes. The presiding judge instructed the jury as follows: "The defendant had a right to use the water as it passed through his land; if he detained it no longer than was necessary for his proper enjoyment of it, the plaintiff cannot recover; whether, if you believe from the evidence in the case that he did detain the water three days at times, at other times five days, at one time thirteen days, in his own dam, to the injury of the plaintiff's mill, this was longer than was necessary for the defendant's proper enjoyment of the water at his mill as it passed through his land, is left for your determination. If you believe it was, you will find for the plaintiff; if you believe it was not, you will find

for the defendant, unless you find that the defendant did maliciously or wantonly detain the water, or that there was some degree of malevolence in the time or quantity of water discharged, to the injury of the plaintiff's mill; for if you believe this, your verdict should be for the plaintiff." The verdict was for the defendant, and exceptions were taken to this ruling, on the ground that the time the water was detained was so long and unreasonable that the plaintiff was entitled to recover; but the upper court overruled the exceptions, and sustained the ruling, alleging as the ground of their determination "the impossibility of making even a general rule for such cases, and that the matter was fairly submitted to the jury": *Hetrich v. Deachler*, 6 Pa. St. 32. *Thurber v. Martin*, 2 Gray, 394 [61 Am. Dec. 468], also, was an action of tort for obstructing the natural flow of the water, and diverting it from the plaintiff's mill. In delivering the opinion of the court, Chief Justice Shaw stated the law of the case. "Every man has the right to the reasonable use and enjoyment of a current of running water, as it flows through or along his own land, for mill purposes, having a due regard to the like reasonable use of the stream by all the proprietors above and below him. In determining what is such reasonable use, a just regard must be had to the force and magnitude of the current, its height and velocity, the state of improvement in the country in regard to mills and machinery, and the use of water as a propelling power, the general usage of the country in similar cases, and all other circumstances bearing upon the questions of fitness and propriety in the use of the water in the particular case."

The doctrine of *Thurber v. Martin*, 2 Gray, 394 [61 Am. Dec. 468], was expressly affirmed in *Chandler v. Howland*, 7 Id. 350 [66 Am. Dec. 487], where the court say that the right of riparian proprietors to the natural flow of water over their lands is "subject to such interruption as is necessary and unavoidable by the reasonable and proper use of the mill privilege above."

In *Pitts v. Lancaster Mills*, 13 Met. 157, the defendants, owners of a mill and dam above an ancient mill-dam of the plaintiffs, rebuilt and raised that dam above its former height, whereby the water was wholly cut off from plaintiff's mill for a period of six days, greatly to his detriment. The case was submitted to the court upon an agreed statement of facts, and a nonsuit was ordered, the court assigning as a reason therefor

that "this was not an unreasonable use of the watercourse by the defendants, and that any loss which the plaintiffs temporarily sustained by it was *damnum absque injuria*." "What is a reasonable use," the court say, "must depend upon circumstances, such as the width and depth of the bed, the volume of water, the fall, previous usage, and the state of improvements in manufactures and the mechanic arts."

2. Of the use of highways upon land and water.

In the several cases, *Veazie v. Dwinel* and *Dwinel v. Veazie*, 50 Me. 479, this court held: 1. That it was not lawful for a mill-owner to obstruct, with the waste from his mill, a channel made by another mill-owner, as a passage-way for rafts, logs, and lumber, from the former's mill on the Penobscot River to and through the sluice in the latter's mill-dam; and 2. That the latter had no right to permanently obstruct this channel by a boom across it, designed to guide his logs into a new channel made by the former, though he might lawfully use this new channel as a passage-way for his logs and erect temporary guide-booms for that purpose. These cases were submitted to the court, who gave this construction to the rights of the respective parties, as a reasonable use of the Penobscot River as a public highway for running logs.

In *Gerrish v. Brown*, 51 Me. 256 [*ante*, p. 569], it was held that if a person obstruct a stream which is by law a public highway, by casting therein waste materials, filth, or trash, or by depositing materials of any description, except as connected with the reasonable use of said stream or highway, or by direct authority of law, he does it at his peril, and is guilty of causing a public nuisance. In that case, the court say: "The plaintiff, like any other citizen, may use the river as a highway for the purposes of navigation; and as incident to the right of navigation, the temporary obstruction of portions of the river while preparing these materials for transportation, or in securing them at the termination of their transit, would not constitute a violation of law. In this respect, public streams are governed by the same general rule as highways upon land."

A temporary occupation of a street or a highway by persons engaged in building, or in receiving or delivering goods from stores or warehouses, is lawful from the necessities of the case, while a persistent and continuous obstruction of a street beyond what is required for a reasonable use of it, even for such purposes, is unjustifiable: *People v. Cunningham*, 1 Denio, 526 [43 Am. Dec. 709]; *Commonwealth v. Passmore*, 1 Serg. & R. 219.

In *Graves v. Shattuck*, 35 N. H. 268 [69 Am. Dec. 536], the plaintiff was obstructed by the defendants, while in the act of removing a building through one of the public streets of Nashua, and brought his action to recover damages occasioned by this act of the defendants. The right of the plaintiff to encumber the street for such purpose was put in issue, and the jury returned a verdict for the plaintiff, the presiding judge according to the plaintiff that right in his instructions to the jury. Exceptions were taken to this ruling, but the court above sustained the instructions, and say: "The doctrine of all the cases on this subject that we have examined seems to be in accordance with the instructions below, that the law justifies obstructions of a partial and temporary character from the necessity of the case, and for the convenience of workmen, when these obstructions occur in the customary or contemplated use of the highway, and that the question of their necessity, and of the customary or contemplated use, is one for the consideration and determination of the jury, under all the circumstances of each particular case."

3. Of the test of reasonable use.

A person is required so to conduct in the exercise of his own rights and in the use of his own property as not to do an injury by his misconduct, or by the want of ordinary care to the rights or property of another. What is reasonable care or due care depends, in every case, on the subject-matter to which the care is to be applied, and the circumstance attending the subject-matter at the time when care is to be applied. Negligence consists in the omitting to do something that a reasonable man would do, or in doing something that a reasonable man would not do, causing, unintentionally, mischief to another. A party who takes reasonable care to guard against accidents arising from ordinary causes is not liable for accidents arising from extraordinary causes.

The test of exemption from liability for injuries arising from the use of one's own property is the legitimate use or appropriation of the property in a reasonable, usual, and proper manner, without any negligence, unskillfulness, or malice: *Noyes v. Shepherd*, 30 Me. 178 [50 Am. Dec. 625]; *Sullivan v. Scripture*, 3 Allen, 566; Hilliard on Torts, 131, sec. 38.

4. Of the essential elements of a nuisance.

If one for his own benefit violates the rights of another, it is a nuisance; and if this consists in the violation of a public right, indictment is the appropriate remedy for its vindication

and redress. Neither express malice nor a disposition or desire to cause damage to another, as in case of malicious mischief, is necessary to the completion of the offense. It is a nuisance if one willfully seeks and pursues his own private advantage, regardless of the rights of others and in plain violation of them; it is a wrong done. And as every man must be presumed to intend all the necessary, natural, and ordinary consequences of his own acts, it is a willful and intended wrong; it is malice in the eye of the law, and no other malice need be proved to show the act to be a nuisance.

Highways, whether on land or water, are designed for the accommodation of the public for travel or transportation, and any unauthorized or unreasonable obstruction thereof is a public nuisance in the eye of the law. They cannot be made the receptacles of waste materials, filth, or trash, nor the depositories of valuable property so as unreasonably to obstruct their use as highways: *Commonwealth v. Temple*, 14 Gray, 69; *Dwinel v. Veazie* and *Veazie v. Dwinel*, 50 Me. 479; *Knox v. Chaloner*, 42 Id. 150.

The authorities relied upon by the learned counsel for the plaintiffs are not essentially in conflict with the general current of decisions to which we have adverted. *Wadsworth v. Smith*, 11 Me. 278, was a case of a private stream, and the general statement of Parris, J., with regard to the rights of parties to the use of navigable rivers, was not elicited by the question at issue, and taken in its strictly literal sense, is not entirely accurate. In *Brown v. Chadbourne*, 31 Me. 26 [50 Am. Dec. 641], it was held that a riparian proprietor has no right permanently to obstruct a public stream by a dam, and that if he builds such a dam he is required to construct and maintain a passage-way by it.

So in *Knox v. Chaloner*, 42 Me. 150, a dam over such a stream was held to be a nuisance. *Cole v. Sprowl*, 35 Id. 169 [56 Am. Dec. 696], and *Sutherland v. Jackson*, 32 Id. 80, were cases of the obstruction of private ways by the erection of buildings. In *Brown v. Watson*, 47 Id. 161 [74 Am. Dec. 482], the defendant obstructed the public highway by wantonly felling trees across it. In these and the other cases cited by the plaintiffs' counsel to this point, the obstructions consisted of permanent erections, such as buildings or dams and the like, and were in no respect necessary to the use of the several highways, for the purposes of travel or transportation.

The general doctrine to be deduced from the authorities we

have collated in reference to the use of navigable rivers or public streams as public highways is, that each person has an equal right to their reasonable use. What constitutes reasonable use depends upon the circumstances of each particular case; and no positive rule of law can be laid down to define and regulate such use, with entire precision, so various are the subjects and occasions for it, and so diversified the relations of parties therein interested. In determining the question of reasonable use, regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, necessity, and duration, and the established usage of the country. The size of the stream, also, the fall of water, its volume, velocity, and prospective rise or fall, are important elements to be taken into the account. The same promptness and efficiency would not be expected of the owner of logs thrown promiscuously into the stream, in respect to their management, as would be required of a ship-master in navigating his ship. Every person has an undoubted right to use a public highway, whether upon the land or water, for all legitimate purposes of travel and transportation; and if, in doing so, while in the exercise of ordinary care, he necessarily and unavoidably impede or obstruct another temporarily, he does not thereby become a wrong-doer, his acts are not illegal, and he creates no nuisance for which an action can be maintained.

Firemen, in extinguishing fires; builders, in erecting or removing buildings; teamsters, in hauling logs or masts to market; truckmen, in loading or delivering merchandise; ship-masters and boatmen, in receiving, transporting, and delivering their cargoes; raftsmen, in managing their rafts; river-drivers, in running logs; and mill-owners, in securing them, — oftentimes, of necessity, require so much of a highway as temporarily to obstruct it; but in such cases they must so conduct themselves as to discommode others as little as is reasonably practicable, and remove the obstruction or impediment within a reasonable time, having regard to the circumstances of the case; and when they have this, the law holds them harmless.

The defendants, as owners of the upper mills, had a right to the reasonable use of the river, not only to float their logs, but also to arrest and detain them at their mill. The current was deep, broad, and rapid, and the quantity of logs borne along by it was very large. Their logs had been intermingled with the plaintiffs' by the mutual act of the parties, and in accord-



ance with the established usage of the country. The means to be employed by the defendants in the work of separation and detention, and the time, mode, necessity, and extent of their use of the river for these purposes, were subjects properly addressed to the practical judgment of the jury, under all the evidence in the case; and it was the right of the defendants to have them so presented.

The case finds that the whole question of the reasonable use of the river was agreed to be submitted to the jury, and the presiding judge instructed them that they might determine this question.

This was a waiver by both parties of their right to except to the instructions of the judge upon the subject of the reasonable use of the river. Whether, therefore, those instructions were correct or erroneous in this respect, is not necessary for us to determine, since the parties, by their own act, have precluded themselves from the right to question their correctness; nor were they material to the issue, as the reasonableness or unreasonableness of the detention of the plaintiffs' logs by the defendants was left to the jury to determine.

After a careful examination of the evidence, we are unable to discover sufficient ground for setting aside the verdict, as prayed for in the defendants' motion.

Exceptions and motion overruled, and judgment on the verdict.

APPLETON, C. J., and CUTTING, DAVIS, WALTON, and BARBOWS, JJ., concurred.

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RIGHT OF PUBLIC OR OF INDIVIDUALS TO USE WATERCOURSES AS HIGHWAYS, AND REMEDIES AVAILABLE TO VINDICATE RIGHT. — The right of the public and of individuals to use watercourses as highways is analogous to the right to use public highways upon the land. The right of navigating upon all waters that are in their natural condition, capable of such use, is a common and paramount right. This right has always been jealously guarded, both in England and in this country, as a great public interest. This paramount right of navigation in a public navigable river is a right in every part of the space between the banks. It is not confined to the channel, or to those parts of the water highway which are most frequently used by vessels: *Gould on Waters*, sec. 86; *Williams v. Wilcox*, 8 Ad. & El. 314; *Colchester v. Brooke*, 7 Q. B. 339; *Attorney-General v. Terry*, L. R. 9 Ch. 423; *Hagan v. Campbell*, 8 Port. 9; S. C., 33 Am. Dec. 267; *Mayor etc. of Mobile v. Esau*, 9 Port. 577; S. C., 33 Am. Dec. 325; *People v. City of St. Louis*, 5 Gilm. 351; S. C., 48 Am. Dec. 339; *Porter v. Allen*, 8 Ind. 1; S. C., 65 Am. Dec. 750; *State v. Babcock*, 30 N. J. L. 29; *Commonwealth v. Church*, 1 Pa. St. 105. And navigators are not culpably negligent in running their boats in any part of a navigable river, that is deep enough to carry them safely: *Porter v.*



*Allen, supra.* As the citizens of a country have an inherent right to use as highways all navigable rivers, it is important to determine what streams are regarded in law as navigable. By the English common law, those rivers only are considered navigable where the tide ebbs and flows. In England, the right to navigate such rivers is public, while the right to navigate in streams above the point where the tide ebbs and flows depends upon user: *Gould on Waters*, secs. 51, 52, 86. But this rule of the common law has been held to be inapplicable to the inland waters of this country. Although in a few early cases in this country a contrary doctrine was held, it is now firmly established that those rivers are navigable in law which are navigable in fact, and that the public have a right of passage over all fresh-water streams that are by nature susceptible of general use: *Id.*, secs. 54, 86; *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Id. 430; *Barney v. Keokuk*, 94 U. S. 324; *Pound v. Turck*, 95 Id. 459; *Rhodes v. Otis*, 33 Ala. 578; S. C., 73 Am. Dec. 439; *Walker v. Allen*, 72 Ala. 456; *Little Rock etc. R. R. Co. v. Brooks*, 39 Ark. 403; S. C., 43 Am. Rep. 277; *Adams v. Pease*, 2 Conn. 481; *People v. City of St. Louis*, 5 Gilm. 351; S. C., 48 Am. Dec. 339; *Healey v. Joliet & C. R. R. Co.*, 2 Ill. App. 435; *Berry v. Carle*, 3 Me. 269; *Spring v. Russell*, 7 Id. 273; *Wadsworth v. Smith*, 11 Id. 278; S. C., 26 Am. Dec. 525; *French v. Camp*, 18 Me. 433; S. C., 36 Am. Dec. 728; *Brown v. Chadbourne*, 31 Me. 9; S. C., 50 Am. Dec. 641; *Moor v. Veazie*, 32 Me. 343; S. C., 52 Am. Dec. 655; *Knox v. Chaloner*, 42 Me. 150; *Treat v. Lord*, Id. 552; S. C., 66 Am. Dec. 298; *Veazie v. Dwinel*, 50 Me. 479; *Pearson v. Rolfe*, 76 Id. 380; *Commonwealth v. Chapin*, 5 Pick. 199; S. C., 16 Am. Dec. 386; *Moore v. Sanborne*, 2 Mich. 519; S. C., 59 Am. Dec. 209; *Lorman v. Benson*, 8 Mich. 18; S. C., 77 Am. Dec. 435; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Thunder Bay Booming Co. v. Speechly*, 31 Id. 336; S. C., 18 Am. Rep. 184; *Commissioners v. Withers*, 29 Miss. 21; S. C., 64 Am. Dec. 126; *Thompson v. Androscoggin Co.*, 54 N. H. 545; *Carter v. Thurston*, 58 Id. 104; S. C., 42 Am. Rep. 584; *Palmer v. Muligan*, 3 Caines, 307; S. C., 2 Am. Dec. 270; *Hooker v. Cummings*, 20 Johns. 90; S. C., 11 Am. Dec. 249; *Ex parte Jennings*, 6 Cow. 518; S. C., 16 Am. Dec. 447; *Morgan v. King*, 35 N. Y. 454; *Hickok v. Hine*, 23 Ohio St. 523; S. C., 13 Am. Rep. 255; *Weise v. Smith*, 3 Or. 445; S. C., 8 Am. Rep. 621; *Felger v. Robinson*, 3 Or. 458; *Shaw v. Oswego Iron Co.*, 10 Id. 371; S. C., 45 Am. Rep. 146; *Baker v. Lewis*, 33 Pa. St. 301; S. C., 75 Am. Dec. 598; *Cates v. Wadlington*, 3 McCord, 580; S. C., 10 Am. Dec. 699; *Stuart v. Clark's Lessee*, 2 Swan, 9; S. C., 58 Am. Dec. 49; *Elder v. Burrus*, 6 Humph. 358; *Sigler v. State*, 7 Baxt. 493; *Selman v. Wolfe*, 27 Tex. 68; *Yates v. Judd*, 18 Wis. 118; *Rowe v. Titus*, 1 Allen (N. B.), 326; *Essex v. McMaster*, 1 Kerr (N. B.), 501.

In this country, rivers are considered navigable in fact when they are used, or are in their ordinary condition susceptible of being used, as highways of commerce, over which trade and travel are or may be conducted in the customary modes. A river capable of floating to market the products of the forest, the mine, or the farm, and upon which boats, barges, rafts, or logs may be borne, is a navigable stream, both in fact and in law. The criterion of navigability is the use to which the stream may be put: *The Montello*, 20 Wall. 430; *Rhodes v. Otis*, 33 Ala. 578; S. C., 73 Am. Dec. 439; *Wadsworth v. Smith*, 11 Me. 278; S. C., 26 Am. Dec. 525; *Treat v. Lord*, 42 Id. 552; S. C., 66 Am. Dec. 298; *Moore v. Sanborne*, 2 Mich. 519; S. C., 59 Am. Dec. 209; *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336. And the right of passage in a public navigable river includes all such rights as necessarily appertain thereto: *Mayor of Colchester v. Brooke*; 7 Ad. & E., N. S., 339; *Baker v. Lewis*, 33 Pa. St. 301; S. C., 75 Am. Dec. 598. It is not necessary to give

the character of navigability to a stream that it shall be capable of being used for navigation continuously at all seasons of the year. It is sufficient if it may be prudently relied upon for use at some seasons of the year, recurring with tolerable regularity, although at no great length of time annually, as a means of carrying off the products of the forests, and bringing merchandise to the dwellers upon its banks: *Walker v. Allen*, 72 Ala. 456; *Little Rock etc. R. R. Co. v. Brooks*, 39 Ark. 403; S. C., 43 Am. Rep. 277; *Moore v. Sanborne*, 2 Mich. 519; S. C., 59 Am. Dec. 209; *Morgan v. King*, 35 N. Y. 454; *Felger v. Robinson*, 3 Or. 458; *Shaw v. Oswego Iron Co.*, 10 Id. 371; S. C., 45 Am. Rep. 146. And if a stream is only capable of floatage in seasons of high water, it is a public highway at those times only: *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336; S. C., 18 Am. Rep. 184. The public may float logs in a stream notwithstanding the fact that it may sometimes be necessary to go upon the banks in order to effect such floating: *Brown v. Chadbourne*, 31 Me. 9; S. C., 50 Am. Dec. 641; *Treat v. Lord*, 42 Id. 552; S. C., 66 Am. Dec. 298. And no accidental or intentional obstructions in a stream, which were not there in its natural state, will take from it its inherent and natural capability of being used as a highway for the purposes of commerce: *Treat v. Lord*, *supra*. Nor can the fact that a floatable stream has not been used by the public, or has been used only by persons following a particular occupation, deprive it of its public character. In the new states of the Union, from necessity and the very nature of things, usage and custom cannot be the foundation of the public right in such streams.

At common law, those rivers only are subject to servitudes of public interests which are of common or public use for carriage of boats and lighters, and for transportation of property, and which were susceptible of use by the public generally for navigation. Their adaptation to a particular use by individuals in the course of their trade, but not to general use, would not constitute them public highways. But in the United States, the public right to the use of rivers for transportation purposes does not depend upon custom or general use, but this right exists upon all streams upon which, in their natural state, there is capacity for valuable floatage, irrespective of the fact of actual public use, or the extent of such use: *Moore v. Sanborne*, 2 Mich. 519; S. C., 59 Am. Dec. 209; *Brown v. Chadbourne*, 31 Me. 9; S. C., 50 Am. Dec. 641.

Navigable streams are highways, and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or water, as a traveler for business. And if a water be navigable for pleasure-boating, it must be regarded as navigable water, though no craft has ever been upon it for purposes of trade or agriculture: *Attorney-General v. Woods*, 108 Mass. 436; S. C., 11 Am. Rep. 380. And a navigable river, at every stage of the water, is free to the public for the purposes of navigation: *Morrison v. Thurman*, 17 B. Mon. 249; S. C., 66 Am. Dec. 153. The public have no right to use as highways streams that are for the most part incapable of being used for purposes of navigation, although for brief periods, in times of freshets, they may contain sufficient water to float vessels, rafts, or logs. Such streams are wholly private, and not subject to any public servitude. Merely because a watercourse may, in times of periodical freshets, for a few weeks be capable of floating mill-logs, but in its natural state, and during a greater portion of the year, is incapable of such floatage, the stream cannot be regarded as a highway for that purpose at any time. The bed and banks of such a stream are wholly private, and in the absence of any claim of prescription or user, they are not subject to the servitude of the public interest, nor to be considered as a public highway: *Hubbard v. Bell*, 54 Ill. 110; S. C., 5 Am. Rep. 98.

A stream so small and shoal that no logs can be driven in it without being propelled by persons traveling on its banks is private property, and not subject to any public servitude for the passage of logs: *Treat v. Lord*, 42 Me. 552; S. C., 66 Am. Dec. 298.

Cooley, J., delivering the opinion of the court in *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336, 343, S. C., 18 Am. Rep. 184, 190, said: "The possibility of occasional use during occasional and brief freshets certainly could not make a stream a public highway." In *Rhodes v. Otis*, 33 Ala. 578, S. C., 73 Am. Dec. 439, it was decided that a stream never before used for transportation, but used in a single instance only for floating lumber only six or seven miles, is not a navigable river; and that no use of a stream by one party alone, however valuable it may be to him, will make it a navigable stream. In *Wadsworth v. Smith*, 11 Me. 278, S. C., 26 Am. Dec. 525, it was held that a small stream, in its natural state not floatable, is absolutely private, and though made floatable by the owner by artificial means, is not subject to public use. In the case of *Meyer v. Phillips*, 97 N. Y. 485, S. C., 49 Am. Rep. 538, the defendant, claiming a prescriptive right in the public, proposed to float logs down a private stream running across the plaintiff's land whenever he chose. The floating would do some injury to the banks and to other lands of the plaintiff. In thirty years the stream had been used for floating logs by not more than twelve person, and by not more than three or four in any year, and for not more than from three to six days in any year. The court decided that the defendant had no right to float logs down this stream through the lands of the plaintiff, and that an action lay to restrain the defendant and to settle the plaintiff's rights. In *Pearson v. Rolfe*, 76 Me. 380, it was decided that a mill-owner is not legally bound to furnish any public passage for logs over his dam or through his mill at a time when the river at that place, in its natural condition, does not contain water enough to be floatable, although the river is generally of a floatable character. He is not bound to provide a public way for the passage of logs over his dam better than would be afforded by the natural condition of the river, unobstructed by his mills. But if one turns the waters of a navigable river from its accustomed bed, the public will have the right to use the stream in its new channel: *Drainel v. Veazie*, 44 Me. 167; S. C., 69 Am. Dec. 94. So when a public river becomes frozen over, all persons have a right to travel on the ice. And if any one cuts a hole in the ice, in or near the traveled way, he will be liable for injuries thereby sustained by those passing over the way, without fault or negligence on their part: *French v. Camp*, 18 Me. 433; S. C., 36 Am. Dec. 728.

**DAMS IN NAVIGABLE STREAMS.**—This subject is considered at length in the note to *McCoy v. Stanley*, 57 Am. Dec. 692.

**POWER OF STATE TO REGULATE USE OF NAVIGABLE STREAMS.**—In the absence of specific legislation by Congress, the legislature of a state may authorize the erection of bridges, piers, dams, or booms in a river lying wholly within the state, although such erections may interfere with the public right of navigation: *Pound v. Turck*, 95 U. S. 459; *Cardwell v. American Bridge Co.*, 113 Id. 205; *Heerman v. Beef Slough Mfg. etc. Co.*, 8 Biss. 334; *United States v. Beef Slough Mfg. etc. Co.*, Id. 421; *Hooker v. Cummings*, 11 Am. Dec. 249; *Lansing v. Smith*, 21 Id. 89; *Attorney-General v. Stevens*, 22 Id. 537; *Parker v. Cutler Mill-dam Co.*, 37 Id. 56; *Bailey v. Philadelphia etc. R. R. Co.*, 44 Id. 593; *People v. City of St. Louis*, 48 Id. 339; *Moor v. Veazie*, 52 Id. 655; *Lorman v. Benson*, 77 Id. 435. Under a legislative authority to construct a railway between certain points, the company may build, maintain,

and repair necessary drawbridges across navigable streams, and will not be liable for a temporary obstruction of the stream in the course of such work: *Hamilton v. Railroad Co.*, 34 La. Ann. 970; S. C., 44 Am. Rep. 451; see also *City of Chicago v. McGinn*, 51 Ill. 266; S. C., 2 Am. Rep. 295; *Hickok v. Hine*, 23 Ohio St. 523; S. C., 13 Am. Rep. 255. Both mill-owners on floatable streams and those running logs are entitled to a reasonable use of the common boom; the right of passage is the superior, but not a usurping or exclusive, right; the law authorizing mills puts some encumbrance upon the rights of passage: *Pearson v. Rolfe*, 76 Me. 380. Cooley, J., delivering the opinion of the court in *Middleton v. Flat River Booming Co.*, 27 Mich. 533, 535, said: "Flat River is a stream valuable for floatage, but not for navigation in the more enlarged meaning of the term. On such a stream it cannot be said that the right of floatage is paramount to the use of the water for machinery. Each right should be enjoyed with due regard to the existence and protection of the other." The right to obtain water-power from a stream for milling purposes, and the right to use the stream for the floatage of logs, modify each other; and though the exercise of each may render the other less valuable, there is no ground for complaint if it is considerate and reasonable: *Buchanan v. Grand River Log Co.*, 48 Mich. 364.

**REMEDIES AVAILABLE TO VINDICATE PUBLIC AND INDIVIDUAL RIGHT TO USE STREAMS AS HIGHWAYS.** — Any unlawful obstruction of the right of navigation is a common nuisance, and is therefore remediable by indictment: Gould on Waters, sec. 121; Hale, De Jure Maris, c. 3; Hale, De Portibus Maris, c. 7; *Rex v. Russell*, 6 Barn. & C. 56; *Rex v. Ward*, 4 Ad. & E. 384; *Rex v. Grosvenor*, 2 Stark. 571; *Rex v. Tindall*, 6 Ad. & E. 143; *Regina v. Betts*, 16 Q. B. 1022; *Regina v. Randall*, Car. & M. 496; *Gates v. Blincoe*, 2 Dana, 158; S. C., 26 Am. Dec. 440; *Veazie v. Dwinel*, 50 Me. 479; *Gerrish v. Brown*, 51 Id. 256; *Commonwealth v. Alger*, 7 Cush. 53; *People v. Vanderbilt*, 26 N. Y. 287; *State v. Babcock*, 20 N. J. L. 29; *Commonwealth v. Church*, 1 Pa. St. 105; *Dugan v. Bridge Co.*, 27 Id. 303; S. C., 67 Am. Dec. 464; *Sigler v. State*, 7 Baxt. 493; *Walker v. Shepardson*, 2 Wis. 384; S. C., 60 Am. Dec. 423. Rice, J., delivering the opinion of the court in *Veazie v. Dwinel*, 50 Me. 490, said: "If, therefore, any person obstruct a stream which is by law a public highway, by casting therein waste material, filth, or trash, or by depositing material of any description except as connected with the reasonable use of such stream as a highway, or by direct authority of law, he does it at his peril. It is a public nuisance, for which he would be liable to an indictment and to an action at law by any individual who should be specially damaged thereby." Or a court of equity may be resorted to for relief upon an information filed by the attorney-general: Gould on Waters, sec. 121; *Attorney-General v. Lonadale*, L. R. 7 Eq. 377; *Attorney-General v. Terry*, L. R. 9 Ch. 423; *Attorney-General v. Tomline*, L. R. 12 Ch. Div. 214; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91; *Yolo Co. v. Sacramento*, 38 Cal. 193; *Attorney-General v. Boston Wharf Co.*, 12 Gray, 553; *Attorney-General v. New Jersey R. R. Co.*, 3 N. J. Eq. 136; *Newark Plank Road Co. v. Elmer*, 9 Id. 75; *Gifford v. New Jersey R. R. Co.*, 10 Id. 171, 177; *Attorney-General v. Delaware R. R. Co.*, 27 Id. 631. And when the nuisance causes both a public and a private injury, a suit in equity may be brought by information and bill: *Attorney-General v. Forbes*, 2 Mylne & C. 123; *Attorney-General v. Lonadale*, L. R. 7 Eq. 377. If an individual sustains special injury from the existence of a public nuisance, he may maintain a bill in equity without the attorney-general: *Cook v. Bath*, L. R. 6 Eq. 177; *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Mussey v. Hershey*, 42 Iowa, 356; *Trent v. Bates*,

27 Mich. 390; *Hickok v. Hine*, 23 Ohio St. 523; S. C., 13 Am. Rep. 255; *Walker v. Shepardson*, 2 Wis. 384; S. C., 60 Am. Dec. 423; *Potter v. Menasha*, 30 Id. 492; *Mississippi etc. R. R. Co. v. Ward*, 2 Black, 485; *Parker v. Winnepiscogee Lake Co.*, Id. 545.

Where a public nuisance consisting of the obstruction of a navigable river works a private injury, the party injured may have its existence restrained by injunction: 3 Pomeroy's Eq. Jur., sec. 1351; *Walker v. Allen*, 76 Ala. 456; *People v. City of St. Louis*, 5 Gilm. 351; S. C., 48 Am. Dec. 339; *Hickok v. Hine*, 23 Ohio St. 523; S. C., 13 Am. Rep. 255; *Attorney-General v. Terry*, L. R. 9 Ch. 423. In the last case, a wharf-owner drove piles into the bed of a river, extending the wharf so as to occupy three feet out of a breadth of about sixty feet available for navigation, and it was held to be such an obstruction as would be restrained at the suit of a municipal corporation empowered by act of Parliament to remove obstructions. But a court of equity will not enjoin the erection of a runway for logs, upon the ground that it will divert the course of a navigable river, unless it appears that the threatened structure will be a nuisance *per se*: *City of St. Louis v. Knapp*, 2 McCrary, 516. Where any individual's right to use a watercourse as a highway is interfered with by obstructions unlawfully caused by another, and he suffers special injury thereby, he may maintain an action for damages against the party responsible for the injury: *St. Louis etc. R'y Co. v. Meese*, 44 Ark. 414; *South Carolina R. R. Co. v. Moore*, 28 Ga. 398; S. C., 73 Am. Dec. 778; *Porter v. Allen*, 8 Ind. 1; S. C., 65 Am. Dec. 750; *Brown v. Chadbourne*, 31 Me. 9; S. C., 50 Am. Dec. 641; *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336; S. C., 18 Am. Rep. 184; *Watts v. Tittabawassee Boom Co.*, 52 Id. 203; *Shaw v. Crawford*, 10 Johns. 236; *Briggs v. New York etc. R. R. Co.*, 30 Hun, 291; *Dugan v. Bridge Co.*, 27 Pa. St. 303; S. C., 67 Am. Dec. 464; *Heerman v. Beef Slough Mfg. etc. Co.*, 8 Biss. 334.

Where an obstruction to navigation is a public nuisance, any person may abate it, and it is generally held that the remedies by abatement and by indictment are in all respects concurrent and co-extensive: Gould on Waters, sec. 128. As to the right of a private person to abate a nuisance without suit, see the note to *Gates v. Blincoe*, 26 Am. Dec. 443, where this subject is discussed at length.

**RIGHT OF NAVIGATOR TO LAND OR DEPOSIT GOODS ON PRIVATE PROPERTY.** — We have said that the right of navigation in rivers and streams which are in fact navigable includes all such rights as are essential to the exercise of the right. This right, therefore, includes the right of anchorage, and as against other vessels, but not against riparian owners, the right to moor to wharves and to the shore: Gould on Waters, sec. 95; *Original Hartlepool Collieries Co. v. Gibb*, L. R. 5 Ch. Div. 713; *Bainbridge v. Sherlock*, 29 Ind. 364; *Sherlock v. Bainbridge*, 41 Id. 35; *Baker v. Lewis*, 33 Pa. St. 301; S. C., 75 Am. Dec. 598. And logs and rafts may be moored for a reasonable time to the shore, for the purpose of making up the rafts, or for the breaking up of the rafts, or for the purpose of enabling the owners to sell them: *Gerrish v. Brown*, 51 Me. 256; *Hayward v. Knapp*, 23 Minn. 430; *Weise v. Smith*, 3 Qr. 445; S. C., 8 Am. Rep. 621. But the public have, as against riparian owners, and as incident to the right of navigation, no common-law right to use private lands adjoining a river or stream above high-water mark, for the purpose of mooring or of landing their goods: Gould on Waters, sec. 99; *Bickel v. Polk*, 5 Harr. (Del.) 325; *Ensminger v. People*, 47 Ill. 384; *Chicago v. Laflin*, 49 Id. 172, 176; *Bainbridge v. Sherlock*, 29 Ind. 364; *Talbott v. Grace*, 30 Id. 389; *Sherlock v. Bainbridge*, 41

Id. 35; *Morgan v. Reading*, 3 Smedes & M. 366; *Steamboat Magnolia v. Marshall*, 39 Miss. 109; *O'Neill v. Annett*, 27 N. J. L. 291; S. C., 72 Am. Dec. 364; *Bell v. Gough*, 23 N. J. L. 624, 677; *Weise v. Smith*, 3 Or. 445; S. C., 8 Am. Rep. 621; *Chambers v. Furry*, 1 Yeates, 167; *Bird v. Smith*, 8 Watts, 434; S. C., 34 Am. Dec. 483; *State v. Randall*, 1 Strob. 110; S. C., 47 Am. Dec. 548; *Blundell v. Catterall*, 5 Barn. & Ald. 268. The right to raft logs down a stream does not involve the right of booming them upon private property for safe-keeping and storage: *Lorman v. Benson*, 8 Mich. 18; S. C., 77 Am. Dec. 435. But in *Morrison v. Thurman*, 17 B. Mon. 249, S. C., 66 Am. Dec. 153, it was held that a navigator may moor his vessel to a tree upon a vacant shore, without being deemed guilty of a wrong, though it is done for convenience only, and not to avoid impending danger; and under circumstances of danger incident to navigation, that he may moor his vessel to a private shore, using such caution to avoid injury to others as circumstances will allow, and being responsible only for such damages as may arise to another from his own positive acts, or from want of proper skill or care.

The public have no right at common law to go upon the banks of navigable rivers to tow their vessels: *Ball v. Herbert*, 3 Term Rep. 253; *Treat v. Lord*, 42 Me. 552; S. C., 66 Am. Dec. 298; *Reimold v. Moore*, 2 Brown N. P. 15; *Ledyard v. Ten Eyck*, 36 Barb. 102. But by statute in Maine the owner of logs is permitted to go upon the bank of a stream to drive his logs, when necessary, upon paying for the damage done by him: *Brown v. Chadbourne*, 31 Me. 9; S. C., 50 Am. Dec. 641; *Hooper v. Hobson*, 57 Id. 273.

RIGHTS OF OWNER OF PROPERTY STRANDED ON ANOTHER'S LAND: See note to *Forster v. Juniata Bridge Co.*, 55 Am. Dec. 509, where this subject is discussed.

WHAT CONSTITUTES NUISANCE, AND REMEDY THEREFOR: See *Norcross v. Thoms*, *post*, *infra*, and note; *Gerrieh v. Brown*, *ante*, p. 569.

THE PRINCIPAL CASE IS CITED to the point that a stream which in its natural state is capable of being used for important purposes of navigation, as for floating logs, must be regarded as a public highway: *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 342; S. C., 18 Am. Rep. 184.

## NORCROSS v. THOMS.

[51 MAINE, 503.]

NUISANCE IS DISTINGUISHABLE FROM TRESPASS, SINCE IT CONSISTS IN USE OF ONE'S OWN PROPERTY in such a manner as to cause injury to the property or other right or interest of another.

LAWFUL AS WELL AS UNLAWFUL BUSINESS MAY BE CARRIED ON so as to prove a nuisance. It is the injury, annoyance, inconvenience, or discomfort thus occasioned that the law regards, and not the particular business from which these result.

PARTY INJURED BY NUISANCE MAY RECOVER COMPENSATION IN CIVIL SUIT upon proof of special and peculiar damage to himself, though the nuisance be public, rendering the guilty party liable to indictment.

BUSINESS OF BLACKSMITH MUST BE CARRIED ON SO AS NOT TO INJURE OTHERS, and it is a nuisance where it is carried on in a shop twelve feet distant from a hotel, and causes, by reason of the cinders, dust, and ashes arising from the shop, serious annoyance and inconvenience to the guests of the hotel, and consequent loss to the hotel-owner.



CASE for damages from an alleged nuisance. The defendant, it was proved, moved a blacksmith's shop to within twelve feet of the plaintiff's hotel, and by reason of the black cinders, dust, and ashes which arose from the shop, the plaintiff was injured in his property, and incurred inconvenience and loss. The defendant maintained that a blacksmith's shop is not in itself a nuisance, and that he was not liable as for maintaining a nuisance unless he carried on the shop in an extraordinary or unusual manner. The judge instructed that if the defendant erected, continued, or used said shop for the exercise of his trade, and by reason thereof the plaintiff was injured in his property, comfort, or convenience, the jury would be authorized to infer that the defendant was guilty of nuisance and liable in damages. Verdict was for the plaintiff, and the defendant excepted.

*F. A. Wilson*, for the defendant.

*Briggs*, for the plaintiff.

By Court, DICKERSON, J. This is an action on the case for an injury sustained on account of an alleged nuisance. This form of action, as its name imports, is the appropriate remedy for injuries arising in particular cases which do not fall within the ancient and technical formulas, and which would otherwise be without remedy.

It is not practicable to give a precise, technical definition of what constitutes a nuisance at common law. Blackstone, in his Commentaries, volume 3, page 215, defines a nuisance to signify "anything that worketh hurt, inconvenience, or damage." "All the acts," says Bishop, 3 Crim. Law, sec. 848, "put forth by man, which tend directly to create evil consequence to the community at large, may be deemed nuisances, where they are of such magnitude as to require the interposition of courts." The only accurate method of ascertaining the meaning of the term "nuisance" at common law is to examine decided cases, adjudged to be or not to be nuisances.

A nuisance is distinguishable from trespass, since it consists in a use of one's own property in such a manner as to cause injury to the property, or other right, or interest of another. It is the injury, annoyance, inconvenience, or discomfort thus occasioned that the law regards, and not the particular business, trade, or occupation from which these result. A lawful as well as unlawful business may be carried on so as to prove a nuisance. The law, in this respect, looks with an impartial



eye upon all useful trades, vocations, and professions. However ancient, useful, or necessary the business may be, if it is so managed as to occasion serious annoyance, injury, or inconvenience, the injured has a remedy. Though the nuisance be public, rendering the guilty party liable to indictment, the sufferer may recover compensation in a civil suit, proving special and peculiar damage to himself: *Cole v. Sprowl*, 35 Me. 161 [56 Am. Dec. 696].

A reference to decided cases will aid in showing the nature, kind, and extent of the injury necessary to render a party liable for maintaining a nuisance, and what trades and occupations have been held to be so conducted as to constitute nuisances.

Being delayed four hours by an obstruction in a highway, and thereby prevented from performing the same journey as many times in a day as if the obstruction had not existed, has been held a sufficient injury to maintain an action against the obstructor: *Greasely v. Coddington*, 2 Bing. 263.

An injury to lands or houses which renders them useless, or even uncomfortable for habitation, is a nuisance: *Howard v. Lee*, 3 Sand. 281.

Using a smith's forge: *Bradley v. Gill*, 1 Lutw. 69; operating a tobacco-mill: *Jones v. Powell*, Hut. 136; carrying on a tannery: *Rex v. Pappineau*, 2 Strange, 686; keeping a livery-stable: *Coker v. Birge*, 10 Ga. 336 [54 Am. Dec. 347]; and manufacturing soap: *Brady v. Weeks*, 3 Barb. 157,—under certain circumstances, have been respectively held to constitute a nuisance.

Our statute does not define a nuisance, but simply provides a remedy for certain injuries arising from a nuisance at common law. It does not deprive a party of his remedy for other injuries arising from the same source, but leaves the common-law doctrine of nuisance in full force and effect: R. S., c. 17, sec. 8.

The business of a blacksmith, though honorable, necessary, and useful, should be carried on so as not to injure others. The close proximity—twelve feet distant—of defendant's blacksmith-shop to the plaintiff's hotel could scarcely be occupied as such without causing serious annoyance and inconvenience to the plaintiff's guests, and consequent loss to himself. The instructions of the presiding judge authorized the jury so to find, and after a somewhat careful examination of the authorities, and the principles upon which they rest, we have not

been able to discover any error in his instructions. Exceptions overruled.

APPLETON, C. J., and CUTTING, DAVIS, KENT, and BARROWS, JJ., concurred.

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WHAT CONSTITUTES NUISANCE: *Ellison v. Commissioners*, 75 Am. Dec. 430, and note 433; *Davis v. Winslow*, ante, p. 573; *Gerrish v. Brown*, ante, p. 569.

PARTY SPECIALLY DAMAGED BY PUBLIC NUISANCE HAS CIVIL ACTION FOR DAMAGES: *Brown v. Watson*, 74 Am. Dec. 482, and note 484; *South Carolina R. R. Co. v. Moore*, 73 Id. 778, and note 785; but ordinarily the remedy against a public nuisance is by indictment: *South Carolina R. R. Co. v. Moore*, supra, and note; *Davis v. Winslow*, ante, p. 573; *Gerrish v. Brown*, ante, p. 569; note to *Tate v. Ohio etc. R. R. Co.*, 71 Am. Dec. 312.

LAWFUL BUSINESS NOT USUALLY ENJOINED: Note to *Ryan v. Copes*, 73 Am. Dec. 115.

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## STINSON v. ROSS.

[51 MAINE, 556.]

**SALE OF REAL OR PERSONAL PROPERTY ON EXECUTION WILL NOT BE VACATED** by a reversal of the judgment, and the writ of restitution after reversal issues only for the amount for which the property sold on execution.

**SHERIFF'S DEED NEED NOT SHOW THAT STATUTE REQUIREMENTS IN REGARD TO NOTICE** were complied with. It is sufficient if the officer's return of the sale on the execution shows that the proper notices were given.

**OWNER OF EQUITY OF REDEMPTION OF LAND MAY MAINTAIN ACTION FOR ITS POSSESSION** against any one except the mortgagee and those claiming under him.

**WRIT of entry.** The demandant claimed title under a sale of the equity of redemption on an execution issued on a judgment afterwards reversed on error; and also under an assignment of the mortgage. The case is presented on report from *nisi prius*.

*Libbey*, for the demandant.

*Stewart*, for the tenant.

By Court, WALTON, J. This is a writ of entry. The demandant claims title as assignee of a mortgage and purchaser of the equity of redemption at a sheriff's sale.

One question is whether a sale on execution is vacated by a reversal of the judgment on which it issued. We think a reversal of the judgment will not have that effect. Upon the reversal of a judgment in a real action, the plaintiff in error will be restored to the land which he lost by it: *Cummings v. Noyes*, 10 Mass. 433. If judgment in a personal action has

been satisfied by a levy on real estate, and the judgment is afterwards reversed, the levy is thereby avoided, and the plaintiff in error may recover the lands, even after they have passed into the hands of a *bona fide* purchaser for value: *Bryant v. Fairfield*, 51 Me. 149. But when property, real or personal, has been sold on execution, the sale will not be vacated by a reversal of the judgment; and the writ of restitution, after the reversal, issues only for the amount for which the property sold on the execution: *Gay v. Smith*, 38 N. H. 171. Such is the law independently of the act of 1860, c. 138, sec. 2, which, being passed after the sale in this case, can have no bearing upon it.

It is objected that the sheriff's deed in this case does not show that the statute requirements in regard to notice were complied with. It is not necessary that it should. The officer's return on the execution shows that the proper notices were given, and that is sufficient: *Welsh v. Joy*, 13 Pick. 477.

In *Pratt v. Skoefield*, 45 Me. 386, the deed being the only evidence relied upon to prove the sale (the officer having died without making any return on the execution), and the recitals being too defective to show that the statute requirements in regard to notice had been complied with, the court held that the deed was inoperative. But this decision is not applicable to a case where, as in this case, there is a good and sufficient return on the execution.

We think the demandant's title under the sale on the execution is valid, and this renders it unnecessary to decide whether the assignment of the mortgage from Catherine Ross to the demandant was valid or not; for being the owner of the equity of redemption, and not being resisted by the mortgagee, or any one claiming under her, the demandant is entitled to possession of the land, as against the tenant, independently of the assignment.

Judgment for demandant.

APPLETON, C. J., and CUTTING, DAVIS, and BARROWS, JJ., concurred.

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STRANGER PURCHASING BONA FIDE AT EXECUTION SALE TAKES TITLE unaffected by the subsequent reversal of the judgment: *Stroud v. Casey*, 78 Am. Dec. 556, and note 558.

RECITALS IN SHERIFF'S DEED NEED NOT SHOW NOTICE OF SALE: *Brook v. Rooney*, 56 Am. Dec. 430.

ONE HOLDING MERELY EQUITABLE OR BENEFICIAL TITLE cannot maintain ejectment in his own name: *Ruffners v. Lewis's Ex'rs*, 30 Am. Dec. 512.

## PATTEN v. WIGGIN.

[51 MAINE, 594.]

**FACTS AUTHORIZING RECOVERY FOR MALPRACTICE CONSTITUTE DEFENSE to action for professional services.**

**LAW REQUIRES THAT PERSON OFFERING HIMSELF TO PUBLIC AS PHYSICIAN OR SURGEON** be possessed of that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of his profession who are in good standing as to qualification, and which reasonably qualify him to undertake the care of patients.

**LAW DOES NOT REQUIRE THAT PHYSICIAN OR SURGEON SHOULD HAVE HIGHEST SKILL,** or largest experience, or most thorough education, equal to the most eminent of the profession.

**PHYSICIAN MUST USE REASONABLE AND ORDINARY CARE AND DILIGENCE IN TREATMENT OF CASE.**

**PHYSICIAN MUST USE HIS BEST SKILL AND JUDGMENT** in deciding upon the nature of the disease, and the best mode of treatment, and the management, generally, of the patient.

**PHYSICIAN IS NOT WARRANTER OF CURE, AND IS NOT RESPONSIBLE FOR WANT OF SUCCESS** in his treatment, unless it is proved to result from want of ordinary care, or ordinary skill and judgment.

**PHYSICIAN IS NOT RESPONSIBLE FOR HONEST MISTAKE OF NATURE OF DISEASE,** or as to the best mode of treatment, when there was reasonable ground for doubt or uncertainty, provided he is properly qualified as a physician, and exercises the proper care.

**WHERE BUT ONE COURSE OF TREATMENT WOULD BE SUGGESTED BY PHYSICIANS** of ordinary knowledge or skill, the adoption of any other course may be evidence of a want of ordinary knowledge, skill, or care.

**TREATMENT OF PHYSICIAN OF ONE PARTICULAR SCHOOL** is to be tested by the general doctrines of his school, and not by those of other schools.

ASSUMPSIT to recover for professional services rendered as a physician to the defendant's minor son. The defense was malpractice in the treatment, and such ignorance, and want of skill and judgment on the part of the plaintiff in managing the case, that the patient was more injured than benefited by his treatment. The court, Kent, J., instructed that if the plaintiff had been guilty of malpractice, or neglect, or want of ordinary care and skill, within the rules hereafter stated, this would be a defense to the claim for compensation for the treatment of the plaintiff's son; and charged the jury as follows: 1. When a man offers himself to the public, or to patients, as a physician or surgeon, the law requires that he be possessed of that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of his profession, who are in good standing as to qualifications, and which reasonably qualify him to undertake the care of patients. This rule does not require that he should have the highest skill, or largest experience, or most thorough education, equal to the most

eminent of the profession in the whole country; but it does require that he should not, when uneducated, ignorant, and unfitted, palm himself off as a professional man well qualified, and go on blindly and recklessly to administer medicines, or perform surgical operations. The rule above stated is the true one. But a physician qualified within this rule may be guilty of negligence or malpractice. 2. The law requires and implies as part of the contract, that when a physician undertakes professional charge of a patient he will use reasonable and ordinary care and diligence in the treatment of the case. 3. The law further implies that he agrees to use his best skill and judgment at all times in deciding upon the nature of the disease, and the best mode of treatment, and the management, generally, of the patient. The essence of the contract is, that he is to do his best,—to yield to the use and service of his patient his best knowledge, skill, and judgment, with faithful attention by day and night, as reasonably required. But there are some things that the law does not imply or require. He is not responsible for want of success in his treatment, unless it is proved to result from want of ordinary care, or ordinary skill and judgment. He is not a warrantor of a cure, unless he makes a special contract to that effect. If he is shown to possess the qualifications stated in the first proposition to authorize and justify him in offering his services as a physician, then if he exercises his best skill and judgment with care, and careful observation of the case, he is not responsible for an honest mistake of the nature of the disease, or as to the best mode of treatment, when there was reasonable ground for doubt or uncertainty. If the case is such that no physician of ordinary knowledge or skill would doubt or hesitate, and but one course of treatment would, by such professional men, be suggested, then any other course of treatment might be evidence of a want of ordinary knowledge or skill, or care and attention, or exercise of his best judgment, and a physician might be held liable, however high his former reputation. If there are distinct and different schools of practice, as Allopathic or Old School, Homœopathic, Thompsonian, Hydropathic or Water Cure, and a physician of one of those schools is called in, his treatment is to be tested by the general doctrines of his school, and not by those of other schools. It is to be presumed that both parties so understand it. The jury are not to judge by determining which school, in their own view, is best. Apply these rules to the evidence. Then, as to medi-

cal and surgical treatment of the case,—was there, or was there not, a want of ordinary skill and judgment, such as to render the plaintiff liable within the above rules?—such evidence as satisfies you that he either did not possess the education, judgment, and skill which authorized him to undertake the case, and enabled him to treat it with ordinary skill, or that he was guilty of that neglect or carelessness in the treatment or investigation of the case which showed that he did not faithfully and honestly apply his skill and knowledge and best judgment. The judge also charged that in cases where authorities differ, or “doctors disagree,” the competent physician is only bound to exercise his best judgment in determining which course is, on the whole, best. Verdict for the plaintiff, and exceptions by the defendant.

*C. A. Everett and J. H. Rice*, for the plaintiff.

*A. Sanborn*, for the defendant.

By Court, APPLETON, C. J. The instructions given were correct. Indeed, the propriety of most of them is not controverted. A plaintiff, in a suit against a physician for malpractice, must prove “that the defendant assumed the character and undertook to act as a physician without the education, knowledge, and skill which entitled him to act in that capacity; that is, he must show that he had not reasonable and ordinary skill; or he is bound to prove, in the same way, that, having such knowledge and skill, he neglected to apply them with such care and diligence, as in his judgment, properly exercised, the case must have appeared to require; in other words, that he neglected the proper treatment from inattention and carelessness”: *Leighton v. Sargent*, 27 N. H. 460 [59 Am. Dec. 388]. The same facts which would authorize a recovery for malpractice would constitute a defense in a suit for professional services. Physicians do not warrant the success of their prescriptions. “The law,” remarks Mr. Justice Woodward, in *McCandless v. McWha*, 22 Pa. St. 261, “demands qualification in the profession practiced; not extraordinary skill, such as belongs only to few men of rare genius and endowments, but the degree which ordinarily characterizes the profession.” The same views of the law were laid down in *Simonds v. Henry*, 39 Me. 155 [63 Am. Dec. 611].

The instructions given were in accordance with the well-settled principles of law. The one requested had been given

in substance. If other instructions had been desired they should have been requested.

Exceptions overruled.

RICE, CUTTING, DAVIS, and KENT, JJ., concurred.

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LIABILITY OF PHYSICIANS AND SURGEONS.—This subject is treated in the notes to *Howard v. Grover*, 48 Am. Dec. 481-487; and *Leighton v. Sargent*, 50 Id. 396-398; see also *Long v. Morrison*, 77 Id. 72; *Simonds v. Henry*, 63 Id. 611.



**CASES**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**MARYLAND.**

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**CENTRAL BANK OF FREDERICK v. COPELAND.**

[18 MARYLAND, 305.]

**ASSIGNEE OF INTEREST IN MORTGAGE CANNOT CLAIM IN ANY OTHER OR STRONGER RIGHT** than that of the assignor.

**DURESS WILL AVOID CONTRACT**, at law or in equity.

**EQUITY WILL NOT ENFORCE CONTRACT AGAINST ONE WHO, ALTHOUGH ACTING VOLUNTARILY**, yet in fact appears to have executed the contract with a mind so subdued by harshness, cruelty, extreme distress, or apprehensions short of legal duress, as to overpower and control the will.

**OFFICER WHO TAKES ACKNOWLEDGMENT OF MORTGAGE OF MARRIED WOMAN CANNOT CONTRADICT** or impeach the certificate of acknowledgment.

**DECLARATIONS AND ACTS LEADING TO AND INDUCING EXECUTION OF MORTGAGE BY MARRIED WOMAN** are admissible as part of the *res gesta*, where she denies the validity of the mortgage on the ground that she was forced to execute it by menaces and threats of her husband.

**ACKNOWLEDGMENT OF MARRIED WOMAN TO MORTGAGE IS NOT CONCLUSIVE THAT HER CONSENT TO ITS EXECUTION WAS VOLUNTARY** and free, and not induced by fear.

**MARRIED WOMAN'S RIGHT TO AVOID MORTGAGE BECAUSE OF DURESS IS NOT IMPAIRED**, nor is the mortgagee's right to set it up as valid strengthened because the mortgagee personally took no part in procuring its execution, but its execution was obtained by the husband, to secure his debt to the mortgagee.

**MORTGAGE EXECUTED BY HUSBAND AND WIFE, OF WIFE'S LANDS, OPERATES ON HUSBAND'S INTEREST** as tenant by the curtesy, although it is invalid as to the wife, on the ground of duress.

**DECREE PRO CONFESSO IS ERRONEOUS**, when passed on order of publication, directing publication for three weeks instead of one month, as required by statute.

**BILL in equity.** On February 25, 1856, George W. Copeland and his wife, Mary Ann E. Copeland, executed a mortgage of

a mill and mill-seat, belonging to Mrs. Copeland, to secure the payment of an antecedent debt due from Copeland to certain persons, Thomas and McPherson. The mortgagees shortly afterwards conveyed the premises to the Central Bank of Frederick, as security for the payment of a debt due to the bank from the mortgagees. On January 29, 1857, the bank and the mortgagees filed a bill for the sale of the mortgaged premises, praying that the proceeds be applied, first, to the payment of the debt due by the mortgagees to the bank, and the residue to the debt due the mortgagees under the mortgage. Copeland was a non-resident, and a decree *pro confesso* was passed against him, on an order of publication directed to be published "once in each of three successive weeks." Mrs. Copeland filed an answer, admitting the execution and acknowledgment of the mortgage, but alleging that she was forced to execute and acknowledge the instrument by the threats and menaces of her husband, which, from her feeble health and shattered nervous system, she was unable to resist. One Hays, the justice who took the acknowledgment of Mrs. Copeland to the mortgage, was called as a witness on her behalf, and his testimony went to show that the husband was present in the room when the mortgage was signed by his wife, and that the consent of the wife was not voluntarily given. Other witnesses, among them Mrs. Copeland's attendant physician and two of her daughters, testified to the effect that Mrs. Copeland had been, and was at the time of executing the mortgage, in feeble health and suffering from nervous and mental depression, caused partly by the harsh conduct of her husband in trying to compel her to execute the mortgage; that her mind was so distracted, confused, and reckless that her physician was of the opinion that she was incapable of making a valid contract; that her husband had threatened that if she did not execute the mortgage he would destroy the property by fire; and that she had declared that she was very much disturbed and troubled about the matter. It was proved that neither McPherson nor Thomas took any active part in procuring the execution of the mortgage. The complainants filed exceptions to the admissibility of the testimony of all the witnesses. The court dismissed the bill, and the complainants appealed.

*John P. Poe and A. Randall*, for the appellants.

*Grayson Eichelberger and Thomas Donaldson*, for the appellees.

By Court, COCHRAN, J. The proceedings upon which this appeal was taken were had upon a bill filed to obtain a decree for the sale of property belonging to Mary Ann E. Copeland, described in the mortgage executed by her husband, George W. Copeland, and herself, to secure the payment of an antecedent debt due from him to McPherson and Thomas. The answer of Mrs. Copeland, although admitting the execution and acknowledgment of the mortgage, puts its validity in issue, on the ground that she was forced to execute and acknowledge it by threats and menaces, which, from feeble health and a shattered nervous system, she was unable to resist; and the leading question presented is, whether the mortgage is voidable by her on the ground stated in the answer. The conveyance from McPherson and Thomas to the Central Bank, through which it claims in this case, if effective for any purpose, can only operate as an assignment of an interest in the mortgage executed to them, and under that instrument, considered as an assignment, the bank, as an assignee, will not be permitted to claim in any other or stronger right than that of the assignors. In this view of the existing relationship of the appellants, the question presented may be determined as one raised between the immediate parties to the mortgage.

The element of obligation upon which a contract may be enforced springs primarily from the unrestrained mutual assent of the contracting parties, and where the assent of one to a contract is constrained and involuntary, he will not be held obligated or bound by it. A contract, the execution of which is induced by fraud, is void; and a stronger character cannot reasonably be assigned to one the execution of which is obtained by duress. Artifice and force differ only as modes of obtaining the assent of a contracting party, and a contract to which one assents through imposition or overpowering intimidation will be declared void, on an appeal to either a court of law or equity to enforce it. The question, whether one executes a contract or deed with a mind and will sufficiently free to make the act binding, is often difficult to determine, but for that purpose a court of equity, unrestrained by the more technical rules which govern courts of law in that respect, will consider all the circumstances from which rational inferences may be drawn, and will refuse its aid against one who, although apparently acting voluntarily, yet in fact appears to have executed a contract, with a mind so subdued by harsh-

ness, cruelty, extreme distress, or apprehensions short of legal duress, as to overpower and control the will: *Balfour v. Welland*, 16 Ves. 156; *Strathmore v. Bowes*, 1 Ves. Jr. 22; *Gillett v. Ball*, 9 Pa. St. 14; *Louden v. Blythe*, 27 Id. 22 [67 Am. Dec. 442]; *Inhabitants of Worcester v. Eaton*, 11 Mass. 368; S. C., 13 Id. 371; 1 Story's Eq. Jur., secs. 239, 240, 243.

As the validity of this mortgage must, therefore, depend on the fact of its execution and acknowledgment by Mrs. Copeland, as her own free and voluntary act, we proceed to consider the evidence contained in the record, by which its character in that respect may be determined. In our opinion, the testimony of Hays, taken to contradict or impeach his certificate of Mrs. Copeland's acknowledgment of the mortgage, was not admissible. That the statements contained in the certificate, under the circumstances, and as between the parties in the case, were open to contradiction by proper and competent proof, cannot be doubted; but it does not follow that a public officer, after the performance of an act required by law, should be permitted to defeat its effect by impeaching his official certificate of the manner in which he performed it. From considerations of public policy, if from no other, he must be held an incompetent witness for such a purpose: *Harkins v. Forsyth*, 11 Leigh, 294.

The objection taken to the admission of the other witnesses, at least so far as their testimony is of declarations and acts leading to and inducing the execution of the mortgage, we think cannot be maintained, and that as such declarations and acts must be considered as a part of the *res gestæ*, their testimony to that extent was properly admitted. From the portion of the evidence to be considered in that connection, it appears that Mrs. Copeland had been, and was at the time of executing the mortgage, much enfeebled in health, and suffering nervous and mental depression, caused in part by the harsh conduct of her husband in reference to the proposed transfer of her property, and that her mind was so distracted, confused, and reckless as to induce the belief on the part of her attending physician that she was incapable of making a valid deed or contract. The execution of the mortgage was preceded by personal menaces and threats of her husband to destroy the property by fire if she did not execute it, and the fact that it was executed and acknowledged involuntarily as a consequence cannot be doubted. The resort to measures thus violent and harsh leads irresistibly to the conclusion that her

consent could not have been obtained otherwise. Her acknowledgment that it was free and voluntary, and not induced by fear, as between the parties to the deed, is not conclusive of the fact that it was so; nor can it, with due regard to the evidence in the case, be so considered. The obvious purpose of the act of 1830, chapter 164, in prescribing this form of acknowledgment, was to guard the wife's title to property against the improper efforts of a husband to wrest it from her, and not to bar from judicial remedy outrages by which such an acknowledgment might be extorted. A husband who by extreme harshness compels a wife to execute a deed of her property against her will, and then in the form prescribed by law for her protection, to sanction the wrong inflicted by acknowledging its involuntary execution to be voluntary and without fear, cannot, by reason of the mere formal acknowledgment, entitle himself, nor any one in whose interest such a wrong may be attempted, to set up and claim upon the deed as a valid conveyance. As the execution and acknowledgment of the mortgage in this case by Mrs. Copeland appears to have been induced by harshness and threats, and the exercise of an unwarrantable authority, so excessive as to subjugate and control the freedom of her will, the aid of this court to support and enforce its provisions against her must be refused. The case of *Bissett v. Bissett*, 1 Har. & McH. 211, referred to in the argument of this case, is so imperfectly reported that it cannot be relied on as an authority upon this question, but if its import be to make the acknowledgment of a deed by a wife under duress conclusive and binding on her in all cases, we think it should not now be regarded as establishing a principle by which this case should be governed.

The fact that McPherson and Thomas personally took no active part in procuring the execution of the mortgage by Mrs. Copeland, does not strengthen their right to set it up as a valid deed, nor does it impair her right to avoid it. Its execution was procured by the husband, acting in their interest and for their benefit; and as their acceptance of the mortgage implies an adoption of his agency, they can have no right to enforce it, free from infirmities originating in this use of unconscionable means to compel its execution.

The only interest, therefore, upon which the mortgage can be held to operate is that of the husband as tenant by the curtesy. To that extent its validity was admitted in the argument of the case, although it was contended on the part of the

appellees that the decree taking the bill *pro confesso* was not authorized by the terms of the order of publication, notice of which appears to have been published, as directed, for three weeks, instead of one month, as required by the act of 1842, chapter 229. We think the decree was open to the objection taken, and that it should, for that reason, be reversed.

In accordance with these views, the court will sign a decree reversing the decrees of the court below, dismissing the bill against Mrs. Copeland, with costs, and remanding the cause for such further proceedings against George W. Copeland as may be necessary for the final determination of the appellants' proper rights and claims.

Decree reversed, and bill dismissed.

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ASSIGNEE OF CHOSE IN ACTION TAKES IT SUBJECT TO EQUITIES: *Warner v. Whittaker*, 72 Am. Dec. 65, and note collecting prior cases; *Adair v. Adair*, 71 Id. 779; *Bloomer v. Henderson*, 77 Id. 453; *Timms v. Shannon*, *post*, p. 632. The principal case is cited in *Marshall v. Cooper*, 43 Md. 61, to the point that the assignee of a thing in action stands in no better position than his assignor, and is subject to the same equitable rights.

DURESS AS GROUND FOR AVOIDING DEED OR CONTRACT: *Harris v. Tyson*, 64 Am. Dec. 661, and note collecting prior cases; *Louden v. Blythe*, 67 Id. 442; *Anonymous*, 73 Id. 461; *Fulton v. Hood*, 75 Id. 664; *Gaines's Adm'r v. Poor*, 79 Id. 559. Contracts procured by threats of destruction of property may be avoided on the ground of duress: *Brown v. Pierce*, 7 Wall. 216; *French v. Shoemaker*, 14 Id. 333; *United States v. Huckabee*, 16 Id. 432; *Kocourek v. Marak*, 54 Tex. 205, all citing the principal case; and see, on the question of duress of property, note to *Hatter v. Greenlee*, 26 Am. Dec. 374; note to *Mayor of Baltimore v. Lefferman*, 45 Id. 159. If a husband makes false representations to his wife to induce her to execute a mortgage of her property to secure his debt, or uses threats or intimidation to compel her to execute it, the mortgage may be avoided, if the husband acts as the mortgagee's agent in procuring the execution of the paper: *Comegys v. Clarke*, 44 Md. 110; so if a wife is permitted to set up duress by her husband in executing a mortgage, as against the mortgagee, it is probably predicted upon the ground that the husband is the agent of the mortgagee in procuring the signature of the wife to the instrument, and is bound by his acts: *Beale v. Neddo*, 1 McCrary, 208, both citing the principal case.

CERTIFICATE OF ACKNOWLEDGMENT OF MARRIED WOMAN MAY BE IMPEACHED FOR FRAUD OR DURESS: *Louden v. Blythe*, 55 Am. Dec. 527, and note; *Hartley v. Frosh*, Id. 772; *Schrauder v. Decker*, 49 Id. 538; *Louden v. Blythe*, 67 Id. 442; *Baldwin v. Snowden*, 78 Id. 303, 305; and see *Dodge v. Hollingshead*, 80 Id. 433. But the certifying officer cannot contradict the certificate: See *Highberger v. Stiffler*, 21 Md. 351, citing the principal case.

MARRIED WOMAN'S SEPARATE ESTATE, WHEN LIABLE FOR HER CONTRACTS OF SURETYSHIP: *Yale v. Dederer*, 72 Am. Dec. 503; *Willard v. Eastham*, 77 Id. 366; *Yale v. Dederer*, 78 Id. 216, and notes thereto. The principal case is cited in *Stephen v. Beall*, 22 Wall. 333, to the point that a married woman may charge her separate property for the security of her husband's debts.

## FELLS POINT SAVINGS INSTITUTION v. WEEDON.

[18 MARYLAND, 320.]

**STATUTE OF LIMITATIONS RUNS ON CERTIFICATE OF DEPOSIT ONLY FROM TIME OF DEMAND ACTUALLY MADE, where it is payable on demand, with interest, on the return of the certificate.**

**CERTIFICATE OF DEPOSIT IS NEGOTIABLE INSTRUMENT, when it is payable to the depositor, or order, on demand, on return of the certificate, and the bank has a right, upon demand of payment, to insist that the certificate should be produced and delivered up, as its voucher of payment, and as security against any future claim.**

**NEGOTIABLE INSTRUMENT, IF LOST, CANNOT BE RECOVERED ON AT LAW.**  
The only remedy in chancery.

**PRAYER THAT PLAINTIFF IS NOT ENTITLED TO RECOVER UPON PLEADINGS AND EVIDENCE IN CAUSE IS TOO GENERAL in its terms, since the Maryland act of 1825, c. 117.**

**PRAYER IS OBJECTIONABLE IN ASSUMING FACT AND LEAVING TO JURY QUESTION OF LAW, where it is to the effect that if the jury find "that the fund deposited" was still in bank, and that "proper" letters of administration have been taken out and granted to the plaintiff, the plaintiff was entitled to recover.**

**PRAYER IS DEFECTIVE IF IT DOES NOT DECLARE LAW IN TERMS EXPLICIT and intelligible to the jury upon the points raised by counsel, where it is granted by the court, after rejecting the prayers offered by the counsel.**

ACTION brought on April 2, 1858, by the plaintiff, as administrator of George F. Allen, upon the following instrument issued to Allen by the defendant: "\$500. Baltimore, May 19, 1854. George F. Allen has deposited in the Fells Point Savings Institution of Baltimore the sum of five hundred dollars, which sum, with interest at the rate of three per cent per annum, will be paid to him, or to his order, on demand, and on returning this certificate." The plaintiff's declaration contained a count for money had and received, and one for money loaned by the plaintiff's intestate to the defendant. The defendant pleaded, besides a special plea, that it was never indebted as alleged, and that the action was barred by the statute of limitations; to which the plaintiff demurred. The court gave no judgment on the demurrer, but by agreement all mere formal defects to the pleadings and evidence were waived, and the question was submitted whether the plaintiff, as administrator, was entitled to recover the amount deposited, without the actual production of the certificate at the trial. The evidence showed that the certificate was in the possession of a third party, and that the bank refused payment unless the certificate was produced. The defendant asked that the jury be instructed: 1. That if they should find that Allen



made the deposit on May 19, 1854, and received a certificate therefor on that day, the plaintiff's remedy was barred by the statute of limitations; 2. That if the jury should find the facts stated in the preceding prayer, and that the certificate has not been lost or destroyed, but was held by a person other than the plaintiff, then he was not entitled to recover; 3. That if the jury should find the facts stated in the preceding prayers, the plaintiff was not entitled to recover without producing the certificate to be canceled; and 4. That the plaintiff is not entitled to recover upon the pleadings and evidence in the cause. The court refused to give the instructions, and charged that if the jury should find from the evidence that the plaintiff's intestate was dead, and that the fund deposited in his lifetime in the Fells Point Savings Institution was still deposited there, and that no claimant or personal representative of Allen had, since May, 1854, produced the certificate, and shall further find that proper letters of administration were taken out and granted to the plaintiff, then the plaintiff was entitled to recover. The verdict and judgment was for the plaintiff, and the defendant appealed.

*James Malcolm and C. L. L. Leary, for the appellant.*

*N. Williams and William Schley, for the appellee.*

By Court, GOLDSBOROUGH, J. The appellee brought this action to recover the amount of a certificate of deposit, issued by the appellant to George F. Allen, alleging in his declaration appellant's indebtedness to appellee's intestate.

To the two counts in plaintiff's declaration, one for money had and received, the other for money lent him by plaintiff's intestate, the defendant pleaded three pleas: 1. That it was never indebted as alleged; 2. The statute of limitations; 3. A special plea; to which the plaintiff demurred. The court passed no judgment on the demurrer.

By an agreement filed in the cause, the question is submitted to this court, whether the appellee, as administrator, is entitled to recover the amount deposited in the hands of the appellant, without the actual production of the certificate at the trial, all mere formal defects in pleading and evidence being waived.

The exceptions to the evidence offered by the appellee being waived by the agreement mentioned, we proceed to consider the ruling of the court in rejecting the four prayers of the ap-

pellant, and the instruction given by it to the jury, which constitute the third exception.

The first prayer was, in our opinion, properly rejected. Though on a bill or promissory note payable on demand the statute of limitations runs from the date of the instrument, and not from the time of demand (see Byles on Bills, 273, and the authorities there cited; also *Ruff's Adm'r v. Bull*, 7 Har. & J. 14 [16 Am. Dec. 290]), this rule does not apply to the case before us. Here the certificate of deposit has attached to it a condition that the amount deposited is payable on the return of the certificate; and the appellant is, in fact, resisting the recovery of the claim upon the ground that this condition is not complied with.

The inducement for this deposit was for the accumulation of interest, and the obligation of the appellant, stated on the face of the certificate, is to pay the principal when demanded, with interest. Upon such a contract, the statute cannot be held to run until the demand has been actually made.

The second and third prayers embrace, substantially, the same proposition, and controlled by the agreement above mentioned, will be considered together.

The certificate of deposit in question was so drawn that the amount mentioned therein was payable to George F. Allen, or order, on demand. Such an obligation has been held negotiable: See *Kilgore v. Bulkley*, 14 Conn. 363; *Bank of Orleans v. Merrill*, 2 Hill (N. Y.), 295; and *Miller v. Austen*, 13 How. 218. This last case was upon a certificate of deposit similar in its import to the one in question. The supreme court say: "The established doctrine is, that a promise to deliver or to be accountable for so much money is a good bill or note. Here the sum is certain and the promise direct. Every reason exists why the indorser of this paper should be held responsible to his indorsee, that can prevail in cases where the paper is in the ordinary form of a promissory note; and as such note, the state courts generally have treated certificates of deposit payable to order." Viewing, therefore, this certificate as having the attributes of a negotiable promissory note, the appellant would have a right, upon demand of payment, to insist that the certificate should be produced, and delivered up, as its voucher of payment, and as its security against any future claim.

By the recent English authorities it seems to be settled that where one is called on to pay a lost negotiable bill or note, the

loss, and consequent non-production, constitute a good defense at law: See Smith's Mercantile Law, 356, and note. And the American authorities there cited generally support the doctrine that when an instrument is lost, upon which, either from its original character or want of negotiability at the time of the loss, the debtor could set up any equitable defense against a subsequent *bona fide* holder, claiming title through the finder, the jurisdiction may be properly exercised at law, but in all other cases the only remedy is in chancery: See also *Rowley v. Ball*, 3 Cow. 303 [15 Am. Dec. 266]; Story on Promissory Notes, sec. 546. •

The certificate of deposit involved in this suit, being shown by the evidence to be in the possession of a third party, that party may, in the absence of proof to show that it was not indorsed by Allen in his lifetime, have a legal right to demand the payment of it. The appellant is, therefore, entitled to be protected against the danger of being compelled to make more than one payment of the same debt by requiring the appellee to produce the certificate.

For these reasons we think that the second and third prayers of the appellant should have been granted. The appellant's fourth prayer was properly rejected, as it is too general in its terms since the act of 1825, chapter 117; *Butler v. State*, 5 Gill & J. 519. The instruction given by the court is not only objectionable, because it assumes that the fund was deposited there, by taking from the jury the finding of that fact, but it also puts to the jury, to determine the character of the letters of administration, a question of law to be decided by the court. The instruction is also defective in not declaring the law in terms explicit and intelligible to the jury upon the points raised by the counsel: See *Hall v. Hall*, 6 Gill & J. 404; *Keener v. Harrod*, 2 Md. 74 [56 Am. Dec. 706].

Judgment reversed, with leave to appellee to take out *procedendo*.

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CERTIFICATE OF DEPOSIT, WHETHER NEGOTIABLE INSTRUMENT: See *London Savings Fund Society v. Hagerstown Savings Bank*, 78 Am. Dec. 390, and cases in note.

DEMAND OF PAYMENT, WHETHER NECESSARY BEFORE ACTION BROUGHT ON CERTIFICATE OF DEPOSIT: See note to *O'Neill v. Bradford*, 42 Am. Dec. 573.

STATUTE OF LIMITATIONS, WHEN RUNS ON CERTIFICATE OF DEPOSIT: See note to *O'Neill v. Bradford*, 42 Am. Dec. 573.

# **BIRNEY v. NEW YORK AND WASHINGTON PRINT- ING TELEGRAPH COMPANY.**

[18 MARYLAND, 341.]

**REJECTION OR GRANTING OF PRAYER DEPENDS FOR ITS CORRECTNESS UPON EVIDENCE**, to which it alone refers, and not upon the state of the pleadings, where the prayer neither points nor refers to the pleadings.

**FINDING OF FACTS MUST BE LEFT TO JURY**, even where the evidence is all on one side; but this is not necessary when the case is tried upon admissions made at the bar. The jury may discredit the testimony, but cannot find contrary to the agreement of the parties.

**PARTY HAS PRIVILEGE OF RAISING ANY QUESTION OF LAW** arising out of the facts of the case, and to demand the opinion of the court distinctly upon it; and the opposite party has the equal privilege of asking an opinion on additional facts not embraced in the hypothesis assumed by the adversary in his prayer, but not the privilege of controlling or modifying that hypothesis.

**PRAYER MAY BE REJECTED AS WHOLE**, where the court cannot grant the entire prayer as made, though a portion of it, in a separate, distinct form, might have been given.

**TELEGRAPH COMPANY IS RESPONSIBLE FOR ANY LOSS OR INJURY** which results from its failure or neglect to transmit a message received by it for transmission.

**TELEGRAPH COMPANY IS NOT COMMON CARRIER**, but a bailee, performing, through its agents, a work for its employer, according to certain rules and regulations, which, under the law, it has a right to make for its government.

**ONE WHO SENDS MESSAGES BY TELEGRAPH IS SUPPOSED TO KNOW** that the company's engagements are controlled by those rules and regulations which it has a right to make, and in law, he ingrafts them in his contract, and is bound by them.

**EXEMPTION FROM LIABILITY FOR NON-TRANSMISSION AND NON-DELIVERY OF UNREPEATED MESSAGES DOES NOT APPLY** to a case where no effort was made by the company, or its agents, to put the message on its transit.

ACTION brought in the court of common pleas of the city of Baltimore, to recover damages caused by the company's total failure to send a message delivered to it by the plaintiff, and for which the price of transmission had been paid. The defendant pleaded that it did not enter into the contract alleged. By an agreed statement of facts, it was admitted that the defendant's authorized agent received from the plaintiff at Baltimore a message to be sent to certain stock-brokers in New York, ordering the sale of certain stocks; but that the defendant wholly failed and neglected to send the message, whereby the plaintiff suffered a loss of two hundred and fifty dollars, by a fall in the price of the stocks. The defendant proved by its agent for receiving messages, that certain rules were posted

in the company's front office on the two side walls, and among them was one informing the public that to guard against mistakes in transmission, every message should be repeated, at charges given, and providing that the company would not be liable for any loss or damage that might ensue "by reason of any delay or mistakes in the transmission or delivery, or from non-delivery, of unrepeated messages, but only engage to use reasonable efforts to secure the services of competent and reliable employees, so as to have their business transacted in good faith. Nor will the company be responsible for mistakes in the transmission, nor for delay in the transmission or delivery, nor for non-transmission or non-delivery, of any repeated message to any extent beyond ten dollars, unless it be insured." The plaintiff, although he paid the price of transmission, did not pay a repeating or insurance price. On cross-examination, the witness testified that the message was received by him at a pigeon-hole immediately in front of the door of the office, and that he did not call the plaintiff's attention to the notice. The plaintiff prayed the court to instruct the jury: 1. That on the written statement of facts, read in evidence, the jury must find for the plaintiff for the amount admitted to have been lost by the plaintiff; 2. This prayer embodied the first, and added, that unless the jury further find that there was a printed notice posted in the defendant's office, notifying senders of messages that an insurance price would be demanded for the purpose of making the defendant liable for the non-transmission of a message, and also find that the contents of the notice were known to the plaintiff, they would find for the plaintiff; and 3. This prayer embodied the first, and added, that although the jury should find that there was a public notice posted in the defendant's office, notifying senders of messages that an insurance price would be demanded for the purpose of making the defendant liable for the non-transmission of messages, the plaintiff would be entitled to recover, unless the jury should find that his attention was called thereto by the agent or agents of the defendant. The court refused to grant the plaintiff's prayers, but instructed the jury, on behalf of the defendant, that the plaintiff was not entitled to recover, if the jury believed that the notice given in evidence was prominently and conspicuously displayed in the office of the company, so that the plaintiff saw, or might have seen, the same. The verdict and judgment was for the defendant, and the plaintiff appealed.

*Benjamin F. Horwitz*, for the appellant.

*C. J. M. Gwin*, for the appellee.

By Court, GOLDSBOROUGH, J. The action in this case was instituted in the court of common pleas of Baltimore city, by the appellant against the appellee, to recover damages for the total neglect to send, or transmit, a message, or dispatch, received by the appellee to be transmitted.

The appellee pleaded that it did not enter into the contract alleged in plaintiff's declaration, for the transmission of the telegraphic dispatch, or message, named therein.

At the trial of the cause, an admitted statement of facts, and the evidence offered by the appellee, were submitted to the jury. The appellant then offered three prayers, and the appellee one prayer. The court rejected the prayers of the appellant, and granted the prayer of the appellee; to this ruling of the court the appellant excepted.

In reviewing the action of the court below, it is proper to notice that the prayers submitted to the court are predicated upon the evidence, without any reference to the pleadings. In such case the rule is, "that where a prayer or prayers neither point nor refer to the pleadings, the correctness of their being rejected or granted depends, not upon the state of the pleadings, but upon the evidence, to which alone they refer": See *Leopard v. Chesapeake & O. C. Co.*, 1 Gill, 227; *Brooke v. Waring*, 7 Id. 5; *Miller v. State*, 12 Md. 207; *Giles v. Fauntleroy*, 13 Id. 126.

In view of the above rule, we are next to consider the reasons assigned by the appellee, why the appellant's prayers were properly rejected. The appellee contends that "in each of these instructions it is stated that on the written statement of facts, read in evidence, the jury must find," etc., and that "the effect of this wording of the prayer is to deprive the jury of their undoubted privilege of deciding upon the truth of the evidence," and cites *Hughes v. Jackson*, 1 Md. 451, and *Ragan v. Gaither*, 11 Gill & J. 489. We find a satisfactory answer to this proposition in *Inloes v. American Ex. Bank*, 11 Md. 185 [69 Am. Dec. 190], in which this court say: "It is well settled that even where the proof is all on one side, the finding of the facts must be left to the jury; but this is not necessary when the case is tried upon admissions at the bar. The jury may discredit the testimony, but cannot find contrary to the agree-

ment of the parties." See also the case of *Armstrong v. Ristean*, 5 Id. 276 [59 Am. Dec. 115].

Again, the appellee contends that the first prayer is bad, "because it could not be granted unless the court assumed the non-existence of all other testimony given in the cause; because by the prayer no part of it is submitted to the finding of the jury." In our opinion, the appellant, in presenting this prayer to the court, only exercised a right recognized by law. In *Whiteford v. Burckmyer*, 1 Gill, 143 [39 Am. Dec. 640], the court say: "We hold it to be the privilege of a party to raise any question of law arising out of the facts of the case, and to demand the opinion of the court distinctly upon it. If the opposite party believes that other facts not embraced in the hypothesis assumed are properly calculated to justify an application for other and different instructions, he has the equal privilege of asking an opinion on the additional facts, but not the privilege of controlling and modifying the hypothesis of his antagonist." Here the appellee has brought itself within the above rule, by asking an instruction from the court on other facts not embraced in the prayer of the appellant. It is further contended by the appellee, that it is protected from the demand of the appellant by its rules and regulations established under the act of 1852, chapter 369.

By a careful examination of those rules and regulations, we find no provision exempting the appellee from liability in a case of default and neglect such as is contained in the statement of facts.

It is admitted by the statement of facts that the appellant delivered the message for transmission, and paid the price demanded for that service; that the person who received it was the authorized agent of the appellee; that the message was received at the appellee's place of business; that the appellee forgot and neglected to send said message and despatch, and it has never been sent. The loss of the appellant in the sale of his stock is also admitted. We must, therefore, regard the appellee as a party contracting to perform a service within the sphere of its business for compensation, which it fails to perform, and for such failure, must account for any loss or injury that results from its neglect; and such loss or injury will be the measure of damages to which the plaintiff is entitled, whether admitted or found by the jury.

The appellant's first prayer was, therefore, improperly rejected. The action of the court below, upon the appellant's



second and third prayers, we must approve. The rule laid down in *Gray v. Crook*, 12 Gill & J. 236, and *Doyle v. Commissioners*, Id. 484, is directly applicable to these prayers. The court say: "Where the court cannot grant the entire prayer as made, though a portion of it, in a separate, distinct form, might have been given, it is not error to reject the whole." We think the latter part of the second and third prayers of the appellant obnoxious to this rule. They substantially raise the question, that though the default and neglect of which the plaintiff complains may be embraced within the rules and regulations exempting the appellee from liability, yet that liability is not removed unless these rules and regulations are brought home to the knowledge of the appellant. In our opinion, the converse of the proposition is true: the appellant was bound in law to know them.

The appellant's counsel attempted to assimilate the responsibility of this telegraph company to that of a common carrier. But the distinction is obvious. It is well defined by the appellee: "What does a telegraph company do? It receives a written message for transmission. It uses machinery to reproduce the words of that message at a distant point, either by direct copying of it under some alphabetical system, or by translating the message into certain symbols, which, marked upon paper at a distant point, are there translated into our ordinary language. It cannot be said to be even in the manual charge of the message, so transmitted, during its transmission. It relies on machinery and upon threads of communication which are liable to breaks or interruption, through accident, influence of the climate, wantonness, or malice. These circumstances make it impossible for the company to remain in actual practical custody of its line."

While a common carrier is an insurer, and is protected from liability by the act of God or the enemies of the state, he can avail himself only of such excuses. He sees what happens to his charge at the moment it happens. But a telegraph company, owing to innumerable causes which may disturb the security of its lines, would be as often open to liability because of the providences of God, unknown to it, as because of any other reason.

This telegraph company is not a common carrier, but a bailee performing, through its agents, a work for its employer, according to certain rules and regulations, which, under the law, it has a right to make for its government. The appellant

is supposed to know that the engagements of the appellee are controlled by those rules and regulations, and does himself, in law, ingraft them in his contract of bailment, and is bound by them.

The appellee cannot be considered a common carrier, because, by the act of 1852, chapter 369, it was authorized to contract, not by the force of any common-law duty or obligation, but in accordance with its rules and regulations, and this power is inconsistent with the common-law definition of a carrier.

The prayer of the appellee was erroneously granted. Conceding that the notice read in evidence contained the terms on which the appellee would receive and transmit messages, and its exemption from liability, as stated in the prayer; and also, that this notice was displayed in the office of the company, so that the appellant saw or might have seen it: still, it is manifest that the terms of the notice neither embrace nor declare an exemption from liability in a case where no effort is made by the company, or its agents, to put a message on its transit. The exemption from liability for the non-transmission and non-delivery of unrepeatd messages, provided for by the rules contained in the notice, does not, in our opinion, in any way embrace or affect this case.

The terms of the notice in which exemption from liability is declared clearly imply an obligation on the part of the company to attempt the transmission and delivery of a message received by it for that purpose, and it would be most unreasonable to permit it to have the benefit of an exemption from liability without first bringing itself within the scope of the exemption provided for, by a full and faithful performance of its implied duties.

While we give full force and effect to the rules and regulations of the appellee in a legal construction of them, we deem it unjust to the appellant to extend that effect beyond the actual terms adopted by the appellee to secure its exemption.

Judgment reversed, and *procedendo* awarded.

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THE PRINCIPAL CASE IS RE-REPORTED in Allen's Telegraph Cases, 195.

TELEGRAPH COMPANY'S POWER TO LIMIT LIABILITY: See *Camp v. Western Union Telegraph Co.*, 71 Am. Dec. 461, and exhaustive note. A telegraph company may limit or modify its liability by stipulation: *Tyler v. Western U. T. Co.*, 60 Ill. 430; S. C., 14 Am. Rep. 44; *Sweetland v. Illinois etc. T. Co.*, 27 Iowa, 447; S. C., 1 Am. Rep. 289; Allen's Tel. Cas. 482; *Bross v. United States T. Co.*, 48 N.Y. 141; S. C., 8 Am. Rep. 531; Allen's Tel. Cas. 684; *Western*

*U. T. Co. v. Neill*, 57 Tex. 289; S. C., 44 Am. Rep. 593; and one who contracts with a telegraph company is bound to know that the engagements of the company are controlled by its rules and regulations, and he himself ingrafts them in his contract, and is bound by them: *United States T. Co. v. Gildersleeve*, 29 Md. 247; S. C., Allen's Tel. Cas. 403; but the company's regulation with regard to the repetition of messages will not apply to a case of neglect, where no effort was made to put a message upon its transit: *Western U. T. Co. v. Graham*, 1 Col. 236; S. C., 9 Am. Rep. 141; 10 Am. Law Reg. 324; Allen's Tel. Cas. 584; *Grinnell v. Western U. T. Co.* 113 Mass. 307; S. C., 18 Am. Rep. 492; *Western U. T. Co. v. Buchanan*, 35 Ind. 439; S. C., 9 Am. Rep. 752. A telegraph company cannot, however, contract against its own negligence: *True v. International T. Co.* 60 Me. 18; S. C., 11 Am. Rep. 162; Allen's Tel. Cas. 539; *Breese v. United States T. Co.*, *supra*. The principal case is cited to the foregoing points; and it is also referred to in *Ellis v. American T. Co.*, 13 Allen, 238, S. C., Allen's Tel. Cas. 319, as being a well-considered case upon this subject.

**TELEGRAPH COMPANY'S GENERAL DUTIES AND LIABILITIES. — TELEGRAPH COMPANIES ARE NOT COMMON CARRIERS. —** Notwithstanding some intimations to the contrary found in some early cases, — *Parks v. Alta California T. Co.*, 13 Cal. 422; S. C., 73 Am. Dec. 589; Allen's Tel. Cas. 114; *Bowen v. Lake Erie T. Co.*, 1 Am. Law Reg. 685; S. C., Allen's Tel. Cas. 7; *MacAndrew v. Electric T. Co.*, 17 C. B. 3; S. C., Allen's Tel. Cas. 38, — it is now too well settled to admit of any question that telegraph companies are not common carriers, and are consequently not insurers of the safety of transmission of messages: Note to *Camp v. Western U. T. Co.*, 71 Am. Dec. 463; Gray on Communication by Telegraph, sec. 8; Scott and Jarnagin on Telegraphs, sec. 230; Cooley on Torts, 646; 2 Thompson on Negligence, 836; Wharton on Negligence, sec. 756; Redfield on Carriers, sec. 556; Lawson on Contracts of Carriers, sec. 1; Schouler on Bailments, 244, note; *Playford v. United Kingdom B. T. Co.*, L. R. 4 Q. B. 706; S. C., 17 L. T., N. S., 243; Allen's Tel. Cas. 437; *Dickson v. Reuter's T. Co.*, L. R. 2 C. P. Div. 62; 3 Id. 1; *Baxter v. Dominion T. Co.*, 37 U. C. Q. B. 470; *Little Rock etc. T. Co. v. Davis*, 41 Ark. 79; *Western U. T. Co. v. Fontaine*, 58 Ga. 433; *Tyler v. Western U. T. Co.*, 60 Ill. 421; S. C., 14 Am. Rep. 38; *Bartlett v. Western U. T. Co.*, 62 Me. 209; S. C., 16 Am. Rep. 437; *Ellis v. American T. Co.*, 13 Allen, 226; S. C., Allen's Tel. Cas. 306; *Grinnell v. Western U. T. Co.*, 113 Mass. 299; S. C., 18 Am. Rep. 485; *Western U. T. Co. v. Carew*, 15 Mich. 525; S. C., Allen's Tel. Cas. 345; *Leonard v. New York etc. T. Co.*, 41 N. Y. 544; S. C., 1 Am. Rep. 446; Allen's Tel. Cas. 500; *Baldwin v. United States T. Co.*, 45 N. Y. 744; S. C., 6 Am. Rep. 165; Allen's Tel. Cas. 613; *Breese v. United States T. Co.*, 48 N. Y. 132; S. C., 8 Am. Rep. 526; Allen's Tel. Cas. 663; *Schwartz v. Atlantic etc. T. Co.*, 18 Hun, 157; *De Rutte v. New York etc. T. Co.*, 1 Daly, 547; S. C., 30 How. Pr. 403; Allen's Tel. Cas. 273; *Bryant v. American T. Co.*, 1 Daly, 575, 584; S. C., Allen's Tel. Cas. 288; *New York etc. T. Co. v. Dryburg*, 35 Pa. St. 298; S. C., Allen's Tel. Cas. 157; *Wolf v. Western U. T. Co.*, 62 Pa. St. 83; S. C., 1 Am. Rep. 387; Allen's Tel. Cas. 463; *Aiken v. Telegraph Co.*, 5 S. C. 358; *Washington etc. T. Co. v. Hobson*, 15 Gratt. 122; S. C., Allen's Tel. Cas. 120; *Shields v. Washington etc. T. Co.*, 4 Am. Law Jour., N. S., 311; S. C., 9 Western Law Jour. 283; Allen's Tel. Cas. 5; *White v. Western U. T. Co.*, 14 Fed. Rep. 710; *Abraham v. Western U. T. Co.*, 23 Id. 315; S. C., 6 West Coast Rep. 163; *Hart v. Western U. T. Co.*, Id. 195. The principal case is cited to this effect in *Western U. T. Co. v. Buchanan*, 35 Ind. 439; S. C., 9 Am. Rep. 752; *Telegraph Co. v. Grinnold*, 37 Ohio St. 310; S. C., 41 Am. Rep. 502;

*Western U. T. Co. v. Neill*, 57 Tex. 288; S. C., 44 Am. Rep. 592; *Western U. T. Co. v. Reynolds*, 77 Va. 181; S. C., 46 Am. Rep. 721. "The reasons of policy and expediency on which the rule of the common law is founded, which imposes on carriers of goods a liability for all losses not caused by the act of God or the public enemy, do not apply to the business of transmitting messages by means of the electric telegraph": *Ellis v. American T. Co.*, *supra*, per Bigelow, C. J.

**TELEGRAPH COMPANIES, WHETHER BAILEES.** — As in the principal case, telegraph companies are sometimes said to be bailees: *Smithson v. United States T. Co.* 29 Md. 162, 167, S. C., Allen's Tel. Cas. 385; *Western U. T. Co. v. Fontaine*, 58 Ga. 433; *Pinckney v. Western U. T. Co.*, 19 S. C. 71. Mr. Schouler, in his work on bailments, 243, note, criticises the disposition to range the business of telegraphing under this head. But the engagement is undoubtedly in the nature of a bailment, *locatio operis mercium vehendarum*. Scott and Jarnagin on Telegraphs, sec. 98; Gray on Communication by Telegraph, sec. 5.

**TELEGRAPH COMPANIES' LIABILITY FOR NEGLIGENCE IN GENERAL.** — While, therefore, telegraph companies are not held to the strict liabilities of common carriers, and are not liable for mistakes and delays caused by atmospheric influences, nevertheless they are responsible for their negligence. But to what degree of care and diligence they are held is variously stated. Some authorities speak of "ordinary," "reasonable," "due," and "proper" care being demanded, while others would exact the "highest" degree: See Scott and Jarnagin on Telegraphs, sec. 120; Schouler on Bailments, 244, note; note to *White v. Western U. T. Co.*, 14 Fed. Rep. 720; *Little Rock etc. T. Co. v. Davis*, 41 Ark. 79; *Tyler v. Western U. T. Co.*, 69 Ill. 421; S. C., 14 Am. Rep. 38; *United States T. Co. v. Gildersleeve*, 29 Md. 232; S. C., Allen's Tel. Cas. 390; *Western U. T. Co. v. Carew*, 15 Mich. 525; S. C., Allen's Tel. Cas. 345; *Leonard v. New York etc. T. Co.*, 41 N. Y. 544; S. C., 1 Am. Rep. 446; Allen's Tel. Cas. 500; *Baldwin v. United States T. Co.*, 45 N. Y. 744; S. C., 6 Am. Rep. 165; S. C., Allen's Tel. Cas. 613; *Hibbard v. Western U. T. Co.*, 33 Wis. 558; S. C., 14 Am. Rep. 775; *Passmore v. Western U. T. Co.*, 78 Pa. St. 238; *Candee v. Western U. T. Co.*, 34 Wis. 471; S. C., 17 Am. Rep. 452; 8 Am. Law Rev. 374; *Stevenson v. Montreal T. Co.*, 16 U. C. Q. B. 530, 540; S. C., Allen's Tel. Cas. 71. The true rule seems to us to require an amount of care and diligence in proportion to the responsibility, and to exact, therefore, a relative high degree: Shearman and Redfield on Negligence, sec. 556; 2 Thompson on Negligence. 837; Wharton on Negligence, sec. 756; *Elliott v. Western U. T. Co.*, 45 N. Y. 549; S. C., 6 Am. Rep. 140; Allen's Tel. Cas. 594; *Breeze v. United States T. Co.* 48 N. Y. 132; S. C., 8 Am. Rep. 526; Allen's Tel. Cas. 663; *De Rutte v. New York etc. T. Co.*, 1 Daly, 547; S. C., 30 How. Pr. 403; Allen's Tel. Cas. 273; *Bartlett v. Western U. T. Co.*, 62 Mo. 209; S. C., 16 Am. Rep. 437, 447; *Western U. T. Co. v. Neill*, 57 Tex. 283; S. C., 44 Am. Rep. 589; *Abraham v. Western U. T. Co.*, 23 Fed. Rep. 315; S. C., 6 West Coast Rep. 163. Thus, says Earl, C., in *Breeze v. United States T. Co.*, *supra*, telegraph companies "do not insure the safe and accurate transmission of messages, but they are bound to transmit them with care and diligence adequate to the business which they undertake, and if they fail in such care and diligence they become responsible." In Shearman and Redfield on Negligence, sec. 556, it is said that "the degree of care which a telegraph company is bound to use may be called 'ordinary,' if we measure the meaning of that word solely by reference to the kind of care which a man of ordinary prudence would use in telegraphing for himself; but as compared

with almost any other kind of business, the care required of a telegrapher would be called 'great care.'"

**LIABILITY FOR ERRORS OR ALTERATIONS THROUGH NEGLIGENCE.**—A telegraph company is, therefore, liable for an error in a message caused by its negligence: Gray on Communication by Telegraph, sec. 21; *Western U. T. Co. v. Blanchard*, 68 Ga. 299; S. C., 45 Am. Rep. 480; *Western U. T. Co. v. Shotter*, 71 Ga. 760; *Tyler v. Western U. T. Co.*, 60 Ill. 421; S. C., 14 Am. Rep. 38; *Western U. T. Co. v. Tyler*, 74 Ill. 168; S. C., 24 Am. Rep. 279; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263; S. C., 4 Am. Rep. 673; Allen's Tel. Cas. 570; this being a violation of its obligation to communicate the message without alteration. And an error in a message is *prima facie* evidence of the company's negligence: *Tyler v. Western U. T. Co.*, *supra*; *Western U. T. Co. v. Meek*, 49 Ind. 53; *Turner v. Hawkeye T. Co.*, 41 Iowa, 458; S. C., 20 Am. Rep. 605; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263; S. C., 4 Am. Rep. 673; Allen's Tel. Cas. 570; *Baldwin v. United States T. Co.*, 45 N. Y. 744; S. C., 6 Am. Rep. 165; Allen's Tel. Cas. 613; compare *Womack v. Western U. T. Co.*, 58 Tex. 176; S. C., 44 Am. Rep. 614; *Western U. T. Co. v. Neill*, 57 Tex. 283; S. C., 44 Am. Rep. 589; and casts the burden of proof upon the company to show that the error was caused by some agency for which it was not liable: Shearman and Redfield on Negligence, sec. 559; 2 Thompson on Negligence, 837; *Western U. T. Co. v. Tyler*, *supra*; *Julian v. Western U. T. Co.*, 98 Ind. 327, 328; *Bartlett v. Western U. T. Co.*, 62 Me. 209; S. C., 16 Am. Rep. 437; *Western U. T. Co. v. Carew*, 15 Mich. 525; S. C., Allen's Tel. Cas. 345; *De Rutte v. New York etc. T. Co.*, 1 Daly, 547; S. C., 30 How. Pr. 403; Allen's Tel. Cas. 273; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; S. C., 41 Am. Rep. 500; *contra*: *United States T. Co. v. Gildersleeve*, 29 Md. 232; S. C., Allen's Tel. Cas. 390; *White v. Western U. T. Co.*, 14 Fed. Rep. 710.

If the operator of the company alters the message in order to make it conform to what he thinks the sender intended, the company is, of course, liable: *Seiler v. Western U. T. Co.*, 3 Am. Law Rev. 777; S. C., Allen's Tel. Cas. 687; so a company which negligently allows a forged dispatch to be substituted for a genuine one, and which delivers the forged dispatch, is liable for the damage thereby sustained: *Strause v. Western U. T. Co.*, 8 Biss. 104.

If the sender of a dispatch is guilty of contributory negligence, as in other cases, he can maintain no action. Thus where the sender, intending to write a certain word, negligently wrote what more nearly resembled another word, the company is not liable for transmitting the word as it appeared to be written: *Koons v. Western U. T. Co.*, 102 Pa. St. 164. So a telegraph company is not liable for a mistake of its clerk in endeavoring, at the request of the sender, to correct a mistake in the written message: *Western U. T. Co. v. Foster*, 64 Tex. 220; S. C., 53 Am. Rep. 764.

**LIABILITY FOR NEGLIGENTLY FAILING TO SEND OR DELIVER MESSAGE.**—A telegraph company is likewise liable for negligently failing altogether to send or deliver a message: Gray on Communication by Telegraph, sec. 22; *Western U. T. Co. v. Buchannan*, 35 Ind. 429; S. C., 9 Am. Rep. 744; *Sprague v. Western U. T. Co.*, 6 Daly, 200; *United States T. Co. v. Wenger*, 55 Pa. St. 282; S. C., Allen's Tel. Cas. 356; although the dispatch be in cipher: *Dangerty v. American U. T. Co.*, 75 Ala. 168; S. C., 51 Am. Rep. 435; 18 Cent. L. J. 428; *Western U. T. Co. v. Reynolds*, 77 Va. 173; S. C., 46 Am. Rep. 715; but it has been otherwise held that for failure to deliver a cipher dispatch a telegraph company was liable only in nominal damages: *Daniel v. Western U. T. Co.*, 61 Tex. 452; S. C., 48 Am. Rep. 305. The law requires a telegraph

company to make, at least, an ordinary and reasonable effort to ascertain where the persons are to whom the message is sent, and a reasonable effort to deliver the message: *Pope v. Western U. T. Co.*, 9 Ill. App. 283. An attempt to deliver a message after business hours, or on Sunday, is no excuse for a failure to deliver thereafter: *Western U. T. Co. v. Lindley*, 62 Ind. 371.

**LIABILITY FOR DELAY.** — It is the duty, also, of a telegraph company to transmit and deliver messages promptly; and it is consequently liable for an unreasonable delay: Gray on Communication by Telegraph, sec. 22; Redfield on Carriers, sec. 570; Cooley on Torts, 647; 2 Thompson on Negligence, 838; *Parks v. Alta California T. Co.*, 13 Cal. 422; S. C., 73 Am. Dec. 589; Allen's Tel. Cas. 114; *Western U. T. Co. v. Hope*, 11 Ill. App. 289; *Pope v. Western U. T. Co.*, 14 Id. 531; *Manville v. Western U. T. Co.*, 37 Iowa, 214; S. C., 18 Am. Rep. 8; *Mackay v. Western U. T. Co.*, 16 Nev. 222. So *Relle v. Western U. T. Co.*, 55 Tex. 308; S. C., 40 Am. Rep. 805; *G. O. & Santa Fe R'y v. Levy*, 59 Id. 542; S. C., 46 Am. Rep. 269; and this is true with reference to cipher dispatches: *Western U. T. Co. v. Fatman*, 73 Ga. 285; S. C., 54 Am. Rep. 877. In this respect, the obligation resting upon a telegraph company is the same as that resting upon a common carrier. But it cannot be expected that a message left for transmission at a small station shall be forwarded and delivered at its destination as quickly as when left at a large office: *Behm v. Western U. T. Co.*, 8 Biss. 131. Where a telegraph company telephones to the place of business of a person to whom a telegram is directed, and learning that he is out of the city, and will be absent for several days, causes the telegram to be delivered at the residence of the person, to his wife, and then informs the sender of the absence of the party from the city, it has done its duty: *Given v. Western U. T. Co.*, 24 Fed. Rep. 119. A company undoubtedly has the right to withhold the delivery of a message until its charges for transmission have been paid: Scott and Jarnagin on Telegraphs, sec. 120.

**LIABILITY IN CASE OF FRAUDULENT MESSAGES.** — Cases have arisen concerning the liability of telegraph companies for sending fraudulent dispatches. In *Ehwood v. Western U. T. Co.*, 45 N. Y. 549, S. C., 6 Am. Rep. 140, Allen's Tel. Cas. 594, a company was held liable for sending a fraudulent message, because of its gross negligence. So in *Strause v. Western U. T. Co.*, 8 Biss. 104, it was held that a telegraph company which negligently allows a forged dispatch to be substituted for a genuine one, and which delivers the forged dispatch, is liable for the damage thereby sustained. In *Bank of California v. Western U. T. Co.*, 52 Cal. 280, 289, 291, it was also decided to be the duty of telegraph companies to use reasonable precaution to prevent access to the employment of its wires by others, and if it is negligent in this respect, so that an unauthorized person gains access to and uses them as a means of fraud, the company is responsible therefor. If, however, a telegraph company is in default, but its default is made mischievous only by the operation of some other intervening cause, such as the dishonesty of a third person, the company is not responsible: *First Nat. Bank v. Telegraph Co.*, 30 Ohio St. 555; S. C., 27 Am. Rep. 485. Thus in *Lowery v. Western U. T. Co.*, 60 N. Y. 198, S. C., 19 Am. Rep. 154, one Brown sent a message by the defendant's telegraph to the plaintiff, asking for five hundred dollars. By the negligence of the defendant's servants, the message was changed to five thousand dollars, which sum the plaintiff sent, and Brown absconded with it. It was held that the defendant was not liable for the loss, its negligence not being the proximate cause thereof. In *Western U. T. Co. v. Meyer*, 61 Ala. 158, S. C., 32 Am. Rep. 1, the plaintiff, who resided at Selma, Alabama, received, through the defendant's telegraph line, a dispatch signed "Max Reis," sup-



posed to be from the plaintiff's nephew, who was on his way from New York to Selma, requesting a sum of money to be telegraphed immediately. The plaintiff sent the money, and received from the defendant a receipt, stating that the money was "to be paid to Max Reis, at Cincinnati." The defendant handed over the money to the person who sent the dispatch to the plaintiff, but he proved to be an imposter, and not the plaintiff's nephew. *Held*, the defendant was not liable to refund the money thus paid.

**PUBLIC NATURE OF BUSINESS.** — While telegraph companies are, as we have seen, not held to the rigid responsibilities of common carriers, they nevertheless have certain resemblances to common carriers, growing out of the public nature of the employment. The duties and consequent liabilities in this regard are frequently regulated by statute.

1. *Duty to Serve All Who Apply, and in Same Manner.* — Like common carriers, they are bound to serve, and serve alike, all who apply, unless a statute permits a discrimination: Scott and Jarnagin on Telegraphs, sec. 128; *Breece v. United States T. Co.*, 48 N. Y. 123; S. C., 8 Am. Rep. 526; Allen's Tel. Cas. 663; *De Rutte v. New York etc. T. Co.*, 1 Daly, 547; S. C., 30 How. Pr. 403; Allen's Tel. Cas. 273; *Friedman v. Gold and Stock T. Co.*, 32 Hun, 4. This principle, it may be observed, is applied to telephone companies: *State v. Nebraska Telephone Co.*, 17 Neb. 126; S. C., 52 Am. Rep. 404, in which case it was held that a telephone company could not arbitrarily refuse its facilities to any person desiring them and offering compliance with its regulations, and *mandamus* will issue to compel the company to do its duty. The charges must be uniform unless a statute allows a preference to be given: Scott and Jarnagin on Telegraphs, sec. 134.

2. *Duty to Transmit All Messages.* — A telegraph company is likewise under an obligation to transmit any message which may be delivered to it, in accordance with its rules and regulations, although it may decline to send messages of an illegal or immoral character: Scott and Jarnagin on Telegraphs, sec. 119; *Western U. T. Co. v. Ferguson*, 57 Ind. 495. It is held, however, to be no part of the corporate duty or business of a telegraph company to collect and send out market reports; and though it voluntarily contracts to furnish such information, it may terminate such contract, and cannot be compelled to enter into another: *Metropolitan etc. Exchange v. Mutual U. T. Co.*, 11 Biss. 531.

3. *Duty to Send Messages in Order of Time Received.* — It is the duty of a telegraph company to forward messages in the order of time in which they are received, unless it is under obligation, by statute or public policy, to give precedence to certain messages, as those of the government, or those of great importance: Scott and Jarnagin on Telegraphs, sec. 129; Gray on Communication by Telegraph, sec. 20; Redfield on Carriers, sec. 570; *Davis v. Western U. T. Co.*, 1 Cim. Sup. Ct. 100; S. C., Allen's Tel. Cas. 563; *Mackay v. Western U. T. Co.*, 16 Nev. 222, 225.

4. *Duty to Preserve Secrecy.* — A telegraph company is also under the obligation to abstain from using or disclosing the intelligence which it contracts to communicate: Scott and Jarnagin on Telegraphs, secs. 136-138; Gray on Communication by Telegraph, sec. 25; Redfield on Carriers, sec. 567; *Bank of California v. Western U. T. Co.*, 52 Cal. 280, 289.

THE PRINCIPAL CASE IS CITED in *Waters's Lessee v. Riggin*, 19 Md. 552, to the point that where a party by his own admissions, or by his own proof, shows facts upon which the court is asked to make a ruling against him, it may assume such facts to be true, because he cannot contradict them; and in *Baltimore Building Assoc. v. Grant*, 41 Id. 569, to the point that where a



prayer is based simply upon the evidence, the question it presents is whether the facts therein stated constitute a good cause of action, without reference to the state of the pleadings; but in *Blackburn v. Beall*, 21 Id. 234, it was said that the proposition for which the principal case was cited, to the effect that a party had a right to have the opinion of the court below upon the propositions submitted by him, as submitted, and to have the decision upon those propositions reviewed by the appellate court, was not of universal and indiscriminate application.

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## BEVARD v. HOFFMAN.

[18 MARYLAND, 479.]

**OFFICE OF JUDGE OF ELECTION IS JUDICIAL IN ITS NATURE**, and such officer cannot be held legally responsible for anything more than an honest and faithful exercise of his judgment, and is not liable for the consequences of mistakes honestly made.

**JUDGE OF ELECTION IS NOT LIABLE FOR REFUSING TO ALLOW PERSON TO VOTE**, under an error of judgment, but is only liable when he acts willfully, fraudulently, or corruptly.

**ACTION** to recover damages against judges of election for refusing to permit the plaintiff to vote. A demurrer to the declaration was sustained. The facts are stated in the opinion.

*Oliver Miller*, for the appellant.

*Joseph M. Palmer*, for the appellees.

By Court, BARTOL, J. The plaintiff in this case, as shown by the record, was a citizen of Carroll County, legally entitled to vote at a presidential election held in that county; the defendants were judges of election, duly appointed, commissioned, and qualified, and acting as such. The declaration charges that the defendants "then and there refused to receive from the plaintiff the ballot which he was authorized by law to cast at said election, and to deposit the same in the said ballot-box, and then and there refused to permit the plaintiff to vote at said election." The defendants demurred to the declaration, thus raising the question whether the matters therein alleged are sufficient in law to entitle the plaintiff to maintain his action. In some aspects, this question is one of great interest and importance; the right alleged to have been violated is justly esteemed as one of the most precious and valuable belonging to the citizen. In our state, where almost every public officer is chosen by the votes of the people, the right of suffrage cannot be too highly prized, or too carefully protected.

At the same time, the nature of our institutions equally demands that public officers, acting faithfully and honestly in the discharge of their duties, and within the limits of their constitutional powers, shall be protected from liability for mistake or errors of judgment from which none are exempt; provided they are unmixed with fraud or corruption. In this case no fraud or corruption is charged in the declaration, but the appellant contends that his right of suffrage being conceded, the defendants are liable to him for damages for depriving him of that right, no matter how innocently they may have acted in the matter.

In passing on this question, we deem it proper to premise that the office held and exercised by the defendants was in its nature judicial, the law having necessarily confided to them the duty of exercising judgment in the discharge of their functions. In such a case, this court is of opinion the officer cannot be held legally responsible for anything more than an honest and faithful exercise of his judgment, and is not liable for the consequences of mistakes honestly made. Although the authorities on this point are not entirely harmonious, the conclusion stated seems to be best supported by them as well as by good reason and sound public policy.

The cases cited by the appellant which appear most strongly to support the opposite conclusion were *Ashby v. White*, 2 Ld. Raym. 938, and *Lincoln v. Hapgood*, 11 Mass. 350. The decisions in those cases assert the principle that a party who, like the plaintiff, has been deprived of a right is thereby injured, and must have his remedy. It seems to us that the error of the application of that principle to this case consists in a misapprehension of what is the right of a citizen under our election laws. In one sense, if he is a legal voter he has the right to vote, and is injured if deprived of it; but the law has appointed a means whereby his right to vote is decided, and for that purpose has provided judges to determine that question, and has also provided the most careful guaranties for a proper discharge of duty by the judges, by the mode of their selection and their oaths of office. In all governments, power and trust must be reposed somewhere; all that can be done is to define its limits and provide means for its proper exercise. When the act in question is that of a judicial officer, all that the law can secure is a guaranty that they shall not with impunity do wrong willfully, fraudulently, or corruptly. If they do so act, they are liable both civilly and criminally;

but for an error of judgment they are not liable, either civilly or criminally. If the citizen has had a fair and honest exercise of judgment by a judicial officer, in his case, it is all the law entitles him to, and although the judgment may be erroneous and the party injured, it is *damnum absque injuria*, for which no action lies.

This, in our opinion, is the most reasonable rule, and it will be found supported by the weight of authority, both in England and in this country.

Judgment affirmed.

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JUDGES OF ELECTION ARE NOT RESPONSIBLE FOR ANYTHING MORE THAN HONEST AND FAITHFUL EXERCISE OF JUDGMENT, but they are liable when they act willfully, fraudulently, or corruptly: See *Jenkins v. Waldron*, 6 Am. Dec. 359; *Wheeler v. Patterson*, 8 Id. 41; *Patterson v. D'Auterive*, 54 Id. 564; *Morgan v. Dudley*, 68 Id. 735; compare *Copen v. Foster*, 23 Id. 632. The principal case is cited to this point in *Elbin v. Wilson*, 33 Md. 142; *Friend v. Hamill*, 34 Id. 304; *State v. Bixler*, 62 Id. 357; *Anderson v. Baker*, 23 Id. 621; *Goetchens v. Matthewson*, 61 N. Y. 440; but compare the decision in the last case.

THE PRINCIPAL CASE IS QUOTED in *Hiss v. State*, 24 Md. 562, to the point that a judicial officer is not liable civilly or criminally, unless he acts willfully, fraudulently, or corruptly; and see it cited to substantially the same effect in *Raynsford v. Phelps*, 43 Mich. 345. It is also cited in *Hardesty v. Taft*, 23 Md. 530, to the point that the willful, fraudulent, or corrupt refusal of a vote by judges of election, or a like denial of registration by the officers appointed to register voters, can be adequately compensated for in damages at law.

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## FULTON v. MACCRACKEN.

[18 MARYLAND, 523.]

PROTEST SHOULD DESIGNATE OR IDENTIFY NOTE TO WHICH IT REFERS, which is usually done by putting on it a copy of the note; but if the original note itself be annexed, and referred to in the body of the protest, it is sufficient.

PROTEST IS SUFFICIENT TO ADMIT IT AS EVIDENCE, IF MEMORANDUM IS INDORSED THEREON of the maker of the note, amount, and date of protest. NOTARY'S NAME MAY BE PRINTED TO NOTICE OF PROTEST, instead of being signed by him in his own handwriting. All that is required is that the notarial certificate should appear to be the act of the officer.

TESTIMONY OF WITNESS IS SUFFICIENTLY DEFINITE TO BE SUBMITTED TO JURY, where, after testifying cautiously and hesitatingly as to sending notices of protest, he said on cross-examination that while he had no doubt that he did mail the notices, he could not say that he distinctly remembered the precise fact.

ATTORNEY MAY TESTIFY THAT HE BROUGHT SUIT FOR CERTAIN FIRM, recovered judgment, collected the money, and paid it over to a person, to

whom he was directed to pay it, by the letter and assignment of one of the firm. The facts are not privileged communications from his clients. PRAYER IS ERRONEOUS WHICH IGNORES EXISTENCE OF FACT of which there was evidence proper to be submitted to the jury and is based upon the theory that another fact exists.

PRAYER IS NOT ERRONEOUS, AS ASSUMING EXISTENCE OF PARTNERSHIP, where the jury are left to find that the note sued upon was "discounted for the use and benefit of the defendants, under the firm name of Fulton and Linn, and that they received the proceeds of said note."

NOTICE OF DISHONOR OF NOTE IS NOT NECESSARY to entitle an accommodation indorser to recover from prior parties on the paper for whose benefit the note was indorsed.

ASSUMPSIT. The facts are sufficiently stated in the opinion, with the exception that the plaintiff offered in evidence the deposition of one Corwine, which stated that he had brought a suit at Cincinnati, in June, 1849, for Fulton and Linn, recovered judgment, collected the money, and paid it over to Maccracken, to whom Fulton had, by letter and assignment, directed him to pay it.

*Edward O. Hinkley and F. W. Brune*, for the appellant.

*W. M. L. Marshall and J. Dean Smith*, for the appellee.

By Court, BARTOL, J. This is an action on a promissory note, brought by the appellee against the appellant and one John M. Linn, as partners, constituting the firm of Fulton and Linn. Linn being returned *non est*, the cause proceeded against the appellant, and this appeal is taken from the judgment rendered against him. In the progress of the trial six bills of exception were taken.

The note sued on was for two thousand dollars, dated Cincinnati, July 10, 1849, made by William Bradley, at ninety days, payable to the order of Sumner Clark, at the office of the Ohio Life and Trust Company, New York; Sumner Clark indorsed the note to Fulton and Linn, who indorsed it, procured the indorsement of the appellee Maccracken thereon, for their accommodation, and obtained a discount of the note for their use at the Hocking Valley Bank, of Lancaster, Ohio, of which bank William Slade, Jr., was cashier. Slade specially indorsed the note as follows:—

"Pay to J. Punnett, cashier, or order.

"WM. SLADE, JR., Cashier."

The note was duly presented and dishonored, and being returned to the Hocking Valley Bank, was paid by the plaintiff.

To prove the partnership, the appellee offered at the trial a

record of a suit brought at Cincinnati, June, 1849, by Lyman Fulton and John M. Linn, as partners, under the firm name of Fulton and Linn, against John R. Betts and others; which evidence was admitted by the court, without objection on the part of the appellant. To prove the presentment and non-payment of the note, he offered the protest made by the notary public, to the admission of which, in evidence, the appellant took his first bill of exceptions.

The protest is in the usual form, stating that "the original promissory note, hereto annexed," was presented to one of the clerks in the office of the Ohio Life and Trust Company, in the city of New York, and payment thereof demanded of him, which he refused, saying, "No funds." The only objection made to the protest is that "it contains no copy of the note presented for verification or identification, but only refers to a note annexed."

The act of 1837, chapter 253, makes the protest of a notary public, duly made, *prima facie* evidence of the facts stated in it. It is necessary that it should designate or identify the note to which it refers; this is usually done by putting on it a copy of the note. But if the original note itself be annexed, as was probably done in this instance, and be referred to in the body of the protest, that would be sufficient. As it appears, however, in the bill of exceptions, the protest is without the note, or a copy of it. But on the back is this indorsement:—

"Wm. Bradley — note, dolls. 2,000 — for W. Slade, Jr., Cash'r. Protested Oct. 11, 1849.

"J. P. GIRAUD FOSTER,

"Notary Public and Attorney at Law."

In our opinion, this indorsement is a sufficient memorandum to show that the protest referred to the note sued on, and therefore that the protest was properly admitted as evidence, under the act of assembly.

The second exception is to the admission in evidence of the notice of protest, given by the notary. No objection is made to the form or contents of the notice, but it is contended the name of the notary ought to have been signed by himself, in his own handwriting, instead of being printed. In our opinion, this exception is not well taken; all that is required is, that the notarial certificate should appear to be the act of the officer. In *Munroe v. Woodruff*, 17 Md. 159, we decided that such official acts may be performed by a clerk employed by the notary; his name need not be signed by his own hand;

it is sufficient that it be affixed by his authority or direction; he may employ the hand of a clerk for that purpose, or a printing-press.

The third exception was taken to the admission of the depositions of Giraud Foster, the notary, with reference to the sending of notices of protest. In the argument of the cause in this court, we did not understand the appellant's counsel as insisting upon this exception, and we think there was no error in admitting the evidence. The fact that the notary's name was affixed in print, as we have before said, is no valid objection, nor do we consider any of the other objections made by the appellant to this evidence as valid or supported by authority.

The fourth exception presents, for our consideration, the testimony of the cashier, William Slade, Jr., which, it is contended, was improperly admitted, because it is alleged to be mere vague and indefinite impressions of the witness, without any distinct knowledge or recollection of the facts about which he testified. This exception was very earnestly and ably pressed by the appellant's counsel in the argument. But after the best consideration we have been able to give the subject, and to the authorities adduced, we are of opinion the testimony was properly admitted. It is impossible to read the witness's testimony without being struck with his cautious and hesitating manner of stating his recollection and belief. Taking the whole together, however, we think it was sufficiently definite to be submitted to the jury. The main fact which the witness was called to prove was the sending of notices of protest to the several indorsers of the note. He states "that the plaintiff took up the note after his liability was fixed by notice of non-payment, which notice came in same envelope with other notices, and was, as witness thinks, served on the plaintiff by himself."

In answer to the cross-interrogatory by defendant, "whether the witness had any distinct and positive recollection that he mailed any notices of protest to the indorsers of said note, in the manner and at the time mentioned in his answers, to the direct interrogatories contained in this deposition," the witness stated "that while he had no doubt that he did mail such notices, he could not say that he distinctly remembered the precise fact." This was competent evidence to be submitted to the jury, whose province it was to determine its weight and credibility, and to pass upon its sufficiency to prove the fact sought to be established.

*Glasgow v. Pratt*, 40 Id. 142; *Spann v. Baltzell*, 46 Id. 346; *Burgess v. Freeland*, 59 Id. 408; *Stoughton v. Swan*, 60 Id. 605; *Lewiston Falls Bank v. Leonard*, 69 Id. 49.

COMMUNICATIONS TO ATTORNEY, WHEN PRIVILEGED: See *Allen v. Harrison*, 73 Am. Dec. 302; *Hunter v. Watson*, Id. 543, and notes to these cases, referring to prior decisions.

## CECIL v. CECIL.

[19 MARYLAND, 72.]

**APPEAL FROM ORDER OR DECREE OF ORPHANS' COURT MAY BE TAKEN BY ANY PERSON**, in Maryland, on whose interest such order or decree has a tendency to operate injuriously; but such person must show that he has an interest in the subject-matter of the decree or decision appealed from.

**DECISIONS OF ORPHANS' COURTS ARE FINAL, IF NOT APPEALED FROM**, in matters *in rem*, such as the *factum* of a will, where solemn proof has been resorted to; and issues involving the same questions will not be determined a second time.

**ONE BECOMES PARTY TO RECORD AND MAY BE CONCLUDED BY IT**, if he avails himself of the provisions of the Maryland code, and places himself in a condition to appeal, by immediately notifying his intention, and having the testimony reduced to writing, at his expense.

**TO MAKE RECORD OF FORMER TRIAL EVIDENCE TO CONCLUDE ANY MATTER IN ISSUE BETWEEN PARTIES**, it should appear by the record, or other proof, that the same matter was in issue and decided at the former trial, between the same parties.

**ESTOPPELS MUST BE RECIPROCAL AND BIND BOTH PARTIES**. They operate only on parties and privies in blood or estate, and can be used neither by nor against strangers.

**ALL PERSONS ARE EQUALLY CONCLUDED BY SAME JUDICIAL PROCEEDINGS**, who are represented by the parties and claim under them, or in privity with them.

**PARTIES, IN LARGER SENSE, ARE ALL PERSONS HAVING RIGHT TO CONTROL PROCEEDINGS**, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies. Only those, therefore, who have enjoyed all of these privileges collectively should be concluded by decision, judgment, or decree.

**ADMINISTRATOR HAS NO INTEREST IN ESTABLISHING FACT OF ADVANCEMENT**, and cannot be said to be a party in interest.

**MATTER IN AVOIDANCE, DENIED BY GENERAL REPLICATION, MUST BE PROVED**.

APPEAL from a *pro forma* decree of the orphans' court of the city of Baltimore, dismissing the appellant's petition. The facts are stated in the opinion.

*A. H. Hobbs*, for the appellant.

*Robert C. Barry and Thomas Donaldson*, for the appellees.

By Court, BOWIE, C. J. This was a petition filed in the orphans' court of Baltimore city, by the appellant, on the



25th of November, 1861, against the appellees, as administrator and next of kin of William Cecil, deceased, charging that Owen Cecil, as administrator, was about to make distribution of his intestate's estate, of which the appellant and appellees were co-distributees; that the defendants had received certain advancements, in cash and negroes, and praying the same might be brought into hotchpot. The appellees Owen and William answered, and denied they had received any advancements.

The appellees Harrington and Hooper, by their answer, insisted that by an order passed by the orphans' court, in the cause of William Cecil, Thomas Owens, and Owen Cecil, administrator, against the said Harrington and Hooper, on the 27th of November, 1861, the question was fully adjudicated and disposed of; they admit the receipt of four thousand five hundred dollars, but aver that it was given to them by said deceased for services rendered; in reference to the negroes, they claim to hold them under bills of sale. To these answers a replication was filed, stating, *inter alia*, that the appellant's petition was exhibited and filed some time before the alleged adjudication in the cause above referred to; that he was not a party to that cause, not notified or summoned to appear, and for these causes was not estopped or concluded thereby. The replication took issue upon the other averments as to advancements.

At the trial of the cause, each party having read his pleadings, the petitioner called his witnesses, and was about to proceed to examine them, when the court decided they would hear no evidence in regard to the sums charged to have been advanced to Mrs. Hooper and Mrs. Harrington, whereupon the appellant took a *pro forma* decree dismissing said petition, and prayed an appeal.

The appellant contends he is not bound by proceedings in the orphans' court between the co-distributees, to which he was not a party on the record. The appellees insist that the ends sought to be attained by the petition filed by the appellant were the same with those set forth in the petition of the appellees, and the orphans' court were right in refusing to hear testimony upon the same subject-matter on which it had passed judgment; and the question is, whether the same matter may be inquired into in the orphans' courts, *toties quoties*, as there are persons interested. The courts of this state, in consideration of the peculiar nature of the jurisdiction of

orphans' courts, and the informality of proceedings therein, have held that "any person on whose interests any order or decree of the orphans' court has a tendency to operate injuriously may appeal therefrom: *Parker v. Gwynn*, 4 Md. 423. Yet they must show they have an interest in the subject-matter of the decree or decision appealed from: *Hoffar v. Stone-street*, 6 Id. 303. In matters *in rem*, such as the *factum* of a will, where solemn proof has been resorted to, their decisions are final, if not appealed from; and issues involving the same questions will not be sent a second time: *Pegg v. Warford*, 4 Id. 385.

The code, art. 5, sec. 40, prescribes a mode by which appeals shall be taken in cases of summary proceedings. "If the decree, order, decision, or judgment shall have been given or made on a summary proceeding, and on the testimony of witnesses, the party shall not be allowed to appeal unless he shall immediately notify his intention, and request that the testimony be reduced to writing; and in such case, the depositions shall be at the cost of the party making the request."

If the party avails himself of the provisions of the code, and places himself in a condition to appeal, by immediately notifying his intention, and having the testimony reduced to writing, at his expense, he then becomes a party to the record, and may be concluded by it. But as far as the record discloses the facts in this case, it is not shown that the appellant was a party to the cause, the decree in which is relied on as conclusive; on the contrary, it is manifest it was a decree in a cause in which appellant was neither complainant nor defendant. The answer relies on an order passed by the orphans' court, in a cause of William Cecil, Thomas Owens, and Owen Cecil, administrator, against Mary Ann Harrington and Caroline Hooper. The record is not pleaded *prout patet per recordum*, or made a part of the answer.

It is a well-settled principle, that, to make the record of a former trial evidence to conclude any matter in issue between the parties, it should appear by the record or other proof that the same matter was in issue and decided at the former trial between the same parties: *Garrott v. Johnson*, 11 Gill & J. 173 [35 Am. Dec. 272]. Estoppels must be reciprocal, and bind both parties. They operate only on parties and privies in blood or estate, and can be used neither by nor against strangers. He that shall not be concluded by the record or other matter shall not conclude another by it: *Alexander v. Waller*, 8 Gill, 247 [50 Am. Dec. 688].

Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever. It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be held bound. Under the term "parties," in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings and to appeal from the judgment. This right involves also the right to adduce testimony and to cross-examine the witnesses on the other side. Persons not having these rights are regarded as strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them or in privity with them, are equally concluded by the same proceedings: 1 Greenl. Ev., secs. 522, 523.

In regard to the decrees and sentences of courts exercising any branches of ecclesiastical jurisdiction, the same general principles govern which we have already stated. The principal branch of this jurisdiction in existence in the United States, is that which relates to matters of probate and administration. And as to these, the inquiry, as in other cases, is, whether the matter was exclusively within the jurisdiction of the court, and whether a decree or judgment has directly been passed upon it. If the affirmative be true, the decree is conclusive. Where the decree is of the nature of proceedings *in rem*, as is generally the case in matters of probate and administration, it is conclusive, like those proceedings, against all the world. But where it is a matter of exclusively private litigation, such as in assignments of dower and some other cases of jurisdiction conferred by particular statutes, the decree stands upon the footing of a judgment at common law: 1 Greenl. Ev., sec. 550.

The preceding citations fully and forcibly announce the general principles which govern judicial tribunals upon the question of *res adjudicata*. A cardinal condition is, that the judgment should be between the same parties and upon the same matter directly in question.

"Parties, in the larger sense, are all persons having a right to control the proceedings, to make defense, to adduce and

cross-examine witnesses, and to appeal from the decision, if an appeal lies": 1 Greenl. Ev., sec. 535.

All these privileges (not any one of them) are essential to the assertion and protection of private rights, and the investigation of the truth. Only, therefore, those who have enjoyed them collectively should be concluded by a decision, judgment, or decree. It is true, privies in blood, in law, and estate are governed by the same rule. The petitioner in this case, not being a party in the larger sense, it remains to inquire whether he is a privy in estate or interest. No one, in this state, can claim a share or interest in the personal estate of an intestate, except through an administrator. It is the administrator's duty to get in the personal estate of the deceased for distribution.

Advancements, however, do not go into the inventory, and constitute no part of the assets for payment of debts, nor increase the fund on which the administrator's commission is allowed. It is optional with the party advanced, whether he will come into hotchpot. The administrator has no interest in establishing the fact of advancement, and cannot be said to be a party in interest. It is wholly immaterial to him whether money or other property, given by his intestate, be brought into the settlement or not. The aggregate of the estate, as far as he is concerned, is neither increased nor diminished. In the absence of all motive to protect the rights of the distributees, it would be hazardous to extend the privy of interest in law, where there is no common interest in fact, and conclude a party in interest by a constructive representation.

The petitioner might, by adopting certain preliminaries, had he been notified in time, have entitled himself to the cumulative remedy of appeal; but that right, it has been well said, would be nugatory and nominal, without the right of producing evidence, cross-examining the respondents' witnesses, and controlling the conduct of the cause in such a manner as to enable the appellate court to determine whether the decree appealed from was erroneous or not.

The petition in this case charges certain specific advancements, in cash, notes, and negroes. The answers of Harrington and Hooper admit the receipt of the amounts specified in the petition, but aver and are ready to prove that said sums were paid in consideration of services rendered. As to the slaves mentioned in said petition, the respondents alleged

they held them by bills of sale, copies of which were exhibited. To which answers a replication was filed denying the services, and declaring the bills of sale were voluntary and without consideration.

In the case of *Stewart v. Pattison*, 8 Gill, 54, the court said: "If money is delivered by a parent to a child, it will be presumed to be an advancement." Here the allegation of the petition is admitted, that they received certain specific sums of money, and certain negroes. Does the qualification annexed, "that they aver and are ready to prove," etc., so neutralize the admissions as to render them inoperative to support the presumption of law, until proof to the contrary is offered? Matter in avoidance, denied by the general replication, must be proved: *Salmon v. Claggett*, 3 Bland, 125.

An answer will not support matter set up in avoidance or discharge, where the matter of avoidance is a distinct fact; in such case, the defense must be proved: *Gibson v. McCormick*, 10 Gill & J. 65. These decisions make it obvious the orphans' court erred in assuming there was no evidence before them to sustain the petition, and whether the same was dismissed upon the plea of *res adjudicata*, or upon the ground of want of evidence, we think the decree below should be reversed, and the cause remanded for further proceedings.

Decree reversed, and cause remanded.

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THE PRINCIPAL CASE, as it again came before the court, is reported in *Cecil v. Cecil*, 20 Md. 153.

DECREES OF PROBATE COURTS, HOW FAR JUDGMENTS IN REM: See note to *Street v. Augusta Ins. etc. Co.*, 75 Am. Dec. 722. The principal case is quoted in *Levy v. Levy*, 28 Md. 31, to the effect that in matters *in rem*, such as the *factum* of a will, where solemn proof has been resorted to, the decisions are final, if not appealed from, and issues involving the same questions will not be sent a second time.

FORMER JUDGMENT IS CONCLUSIVE UPON SAME MATTER BETWEEN PARTIES AND PRIVIES: *Doty v. Brown*, 53 Am. Dec. 350, and note; *Embury v. Conner*, Id. 325; *Emery v. Fowler*, 63 Id. 627; *Norton v. Doherty*, Id. 758; *Horton v. Critchfield*, 65 Id. 701; *Lord v. Chadbourne*, 66 Id. 290; *Thomason v. Odum*, 68 Id. 159; *Grassmeyer v. Beeson*, 70 Id. 309; *Ellis v. Clarke*, Id. 603; *Tadlock v. Eccles*, 73 Id. 213; *Warwick v. Underwood*, 75 Id. 767. Where the parties and the subject-matter are the same, a decree in a former suit is admissible in evidence in a pending one: *Clagett v. Easterday*, 42 Md. 627; but to make a record evidence to conclude any matter, it should appear by the record, or by other proof, that the matter was in issue in that suit: *Whitehurst v. Rogers*, 88 Id. 512, both citing the principal case.

**JUDGMENTS ARE BINDING UPON PARTIES AND PRIVIES ONLY:** *Lord v. Chadbourne*, 66 Am. Dec. 290; *Detrick v. Migatt*, 68 Id. 584; *Whitney v. Higgins*, 70 Id. 748; *Lipcomb v. Postell*, 77 Id. 651, and notes to these cases. A judgment is not binding on a person who is neither a party nor a privy to the suit: *Niller v. Johnson*, 27 Md. 12, citing the principal case.

**PARTIES AND PRIVIES, WHO ARE, SO AS TO BE BOUND BY JUDGMENT:** See *Lipcomb v. Postell*, 77 Am. Dec. 651; *Winston v. Westfeldt*, 58 Id. 278; note to *Howard v. Kennedy's Ex'rs*, 39 Id. 311. The principal case is cited in *McKinzie v. Baltimore etc. R. R.*, 28 Md. 174, to the point that the term "parties," is not restricted to those who appear as plaintiffs and defendants upon the record, but includes those who are directly interested in the subject-matter of the suit, know of its pendency, and have the right to control, direct, or defend it.

**THE PRINCIPAL CASE IS ALSO CITED** in *Clark v. Wilson*, 27 Md. 700, to the point that it is a presumption of law, liable, however, to be rebutted by evidence, that a gift from parent to child, unexplained at the time, or a conveyance which is silent as to its design, is an advancement.

## TIMMS v. SHANNON.

[19 MARYLAND, 296.]

**WRITTEN CONTRACT, AS EVIDENCED BY BONDS AND MORTGAGE, CANNOT BE VARIED**, in the absence of fraud, accident, or mistake, in a suit to foreclose the mortgage, by evidence of a parol agreement to the effect that at the time when a deed of the land was made, and the bonds and mortgage were executed to secure payment of the purchase-money, the grantor promised to pay off an existing mortgage on the land, and if he should fail to do so, the grantee might retain a sufficient sum for that purpose out of the last installments of the price; especially when such evidence is introduced to raise an equity against an assignee of the mortgage in good faith, without notice or knowledge of the agreement.

**PAROL EVIDENCE TO VARY OR CONTRADICT WRITTEN CONTRACT IS INADMISSIBLE IN EQUITY**, as well as at law, in the absence of fraud, accident, or mistake.

**STIPULATIONS IN AGREEMENT FOR SALE OF LAND MUST BE CONSIDERED AS DISCHARGED BY EXECUTION OF CONTRACT** by the acceptance of a deed of conveyance of the land, and the giving of bonds and mortgage to secure the purchase-money, there being no fraud, mistake, or surprise charged or proved in the transaction.

**GRANTEE WHO ACCEPTS DEED WITH SPECIAL WARRANTY, AND EXECUTES BONDS AND MORTGAGE FOR PURCHASE-MONEY, CANNOT CLAIM DEDUCTION or abatement** from the mortgage debt by reason of an outstanding incumbrance on the land within the warranty, in a suit brought by an assignee to foreclose the mortgage.

**MORTGAGE OF LANDS IS REGARDED IN EQUITY AS MERE SECURITY FOR MONEY**, a chattel interest or chose in action, the debt being considered as the principal, and the mortgage as the accessory, or appurtenant thereto.

**ASSIGNEE OF CHOSE IN ACTION NOT NEGOTIABLE TAKES IT SUBJECT TO EQUITIES** existing against it in the hands of the assignor, at the time of the assignment.

**ACTUAL EVICTION IS NECESSARY TO CONSTITUTE DEFENSE TO ACTION FOR PURCHASE PRICE OF LAND**, on the ground of failure of consideration from a defect in title, where a deed has been given, and the purchaser has entered into possession; although an eviction is not necessary, where there has been no conveyance. The grantee, who is not evicted, but remains in undisturbed possession, must rely on his covenants, except in case of fraud.

**BILL in equity to foreclose a mortgage.** The facts are stated in the opinion.

*Otho Scott*, for the appellant.

*J. T. McCullough*, for the appellee.

By Court, **BARTOL, J.** On the third day of July, 1851, by articles of agreement, Thomas Keen contracted to sell to William Timms a tract of land in Cecil County for five thousand dollars. Keen bound himself to convey the land by deed, with general warranty, on or before the first day of August, 1851, and Timms, on his part, contracted to pay five hundred dollars of the purchase-money on the first day of August, 1851, with interest on the whole sum from the date of the articles, and to pay the residue as follows: one thousand dollars on the first day of May, 1852, one thousand dollars on the first day of May, 1853, one thousand dollars on the first day of December, 1854, one thousand dollars on the first day of December, 1855, and five hundred dollars on the first day of December, 1856. The interest on the whole sum remaining unpaid to be paid at the respective times mentioned; and to secure the payment of these sums, Timms contracted to execute his bonds and a mortgage of the land purchased, as well as of another parcel of land belonging to him in Cecil County.

On the thirty-first day of July, 1851, Thomas Keen and wife executed a deed, conveying to Timms the land mentioned in the articles of agreement, with a covenant of warranty against all persons claiming under the said Keen. And on the following day (the 1st of August, 1851), Timms paid the sum of five hundred dollars, and executed six bonds to secure the payment of four thousand five hundred dollars, and interest, at the times mentioned in the articles of agreement, four of them for one thousand dollars each, and two for two hundred and fifty dollars each. At the same time a mortgage was executed by Timms, which is not exhibited in the cause, nor does it appear in proof for what reason it was canceled, destroyed, or abandoned. Timms, in his supplemental answer,



alleges that it was deemed defective. And on the sixteenth day of January, 1852, the mortgage sued on was executed, in lieu of the other, describing the several bonds of the 1st of August, 1851, and conditioned for their payment.

After the payment by Timms of all the bonds, except the last three, one for one thousand dollars, and two for two hundred and fifty dollars each, Thomas Keen, the mortgagee, on the eighth day of December, 1856, assigned the mortgage to the appellee, William Shannon, and transferred to him the three last mentioned bonds, and to enforce their payment, Shannon, on the twenty-third day of December, 1856, filed this bill.

The defenses relied on by the appellants are as follows: It appears that in January, 1856, Timms sold and delivered to Keen goods to the amount of \$74.02, and on the twenty-second day of May, 1856, he sold and delivered to Keen a horse and yoke of oxen at the price of \$175, and claims that he is entitled to have these sums applied as credits upon the mortgage debt, by virtue of an agreement and understanding made at the time with Keen, the mortgagee, that they should be so applied.

It further appears from the proceedings that at the time of the sale and conveyance of the land in question by Keen to Timms, there was an outstanding mortgage on the same land executed by Keen, and held by one George Davis, dated the twenty-ninth day of December, 1849, and intended to secure the payment of one thousand dollars, with interest, one half on the first day of January, 1855, and one half on the first day of January, 1856; and the appellant contends that he is entitled to have abated from the mortgage debt the amount due on that outstanding mortgage to Davis, a portion of the interest on which he claims to have paid on the first day of January, 1857, and the whole of the principal and interest on the sixth day of October, 1857.

This claim for allowance or abatement on account of the mortgage to Davis will be first disposed of.

In the argument, it was based on several grounds.

1. An alleged agreement by parol, made by Keen at the time the deed for the land was made, and the bonds and mortgage of the 1st of August were executed, to the effect that he would pay the mortgage debt to Davis, and if he should fail to do so, that Timms should retain a sufficient sum for that purpose out of the last installments of the purchase-money.

To prove this agreement, the testimony of the witness, Lloyd, was adduced, and excepted to as inadmissible, because it varies or contradicts the written contract between the parties as evidenced by the bonds and mortgage. An examination of the authorities cited by the appellee on this point has satisfied us that this exception is well taken, and that the parol evidence is wholly inadmissible.

In this case, there is no allegation of any fraud, accident, or mistake in the execution of the bonds or mortgage, and in the absence of such allegation, the same general rule prevails in equity as at law: 2 Story's Eq. Jur., sec. 1531; *Watkins v. Stockett*, 6 Har. & J. 435. In the case of *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273, Chancellor Kent, in speaking of this rule of evidence, said: "But I apprehend the rule to be too reasonable and too well settled to be now disturbed, that when an agreement is reduced to writing, all previous negotiations are resolved into the writing, as being the best evidence of the certainty of the agreement; everything before resting in parol becomes thereby extinguished or discharged." Under this rule, which this court is not at liberty to disregard, the alleged parol agreement, and the evidence adduced to prove it, must be entirely excluded from our consideration. In no possible view of the case could such evidence be introduced to raise an equity against this complainant, who took his assignment in good faith, without any notice or knowledge of such an agreement.

2. As to the articles of agreement on which the appellants next rely, it is only necessary to say that the contract between the parties having been executed, by the acceptance of the deed of conveyance of the land and the execution of the bonds and mortgage by the appellants, and no fraud, mistake, or surprise being charged or proved in the transaction, the stipulations in the agreement must be considered as thereby discharged; and on these instruments alone, viz., the bonds, mortgage, and deed, must depend the rights of the parties.

We shall therefore proceed to consider—

3. Whether the appellants are entitled to the abatement or allowance claimed of the amount of the mortgage held by Davis, by reason of the special warranty in the deed. In deciding this question, we treat the mortgage sued on as if it had been executed on the first day of August, 1851, when the bonds were given. We understand the appellee, in his written

argument, to admit that at that time a mortgage was executed for which this one was afterwards substituted. The point then presented is, whether if a purchaser of land accept a deed with special warranty, and execute his bonds and mortgage for the purchase-money, he can, in a suit in equity brought by an assignee of the mortgage to enforce its payment, claim to be allowed a deduction or abatement from the mortgage debt, by reason of an outstanding encumbrance on the land within the warranty. It is material to observe that the parties litigant are not the original parties to the transaction. The complainant claims as a *bona fide* assignee of the mortgage; and the point stated involves the question of the effect of the assignment, and requires us to determine how far the equitable defense now set up by the mortgagor is thereby affected.

In courts of equity, a mortgage of lands is regarded as a mere security for money, a chattel interest or chose in action, the debt being considered as the principal and the mortgage as the accessory or appurtenant thereto: See *Jamieson v. Bruce*, 6 Gill & J. 74 [26 Am. Dec. 557]; *Pratt v. Vanwyck*, Id. 498; *Chase v. Lockerman*, 11 Id. 210 [35 Am. Dec. 277]; *George's Creek Coal and Iron Co.'s Lessee v. Detmold*, 1 Md. 237; see also *Clark v. Levering*, 1 Md. Ch. 178; and *Ohio Life Ins. and Trust Co. v. Ross and Winn*, 2 Id. 25.

In the case last cited, Chancellor Johnson, in considering the rights of an assignee of a mortgage of lands, recognized as applicable the well-established rule, "that an assignee of a chose in action, not negotiable, takes it subject to the equities which existed against it, in the hands of the assignor, at the time of the assignment. The same point was ruled by this court at the last term, in the case of *Central Bank of Frederick v. Copeland*, 18 Md. 305 [*ante*, p. 597].

This brings us to the inquiry, whether the equitable defense now insisted on by the appellants, existed at the time of the assignment, and could have been then successfully urged to defeat a recovery of the mortgage debt. If not, then it cannot now be sustained for the rights of the assignee are in no manner affected by the acts of the mortgagee and mortgagor, which may have been done since. At the time of the assignment of the mortgage to Shannon, there was an outstanding encumbrance on the land, against which Timms had accepted and held the personal covenant of warranty of Keen. In our opinion, that covenant created no equity which could affect the rights of Shannon, the assignee.

The general rule on this subject, as stated by Chancellor Kent, is, that after the purchase has been carried completely into execution by the delivery of the deed, "if there has been no ingredient of fraud, and the purchaser is not evicted, the insufficiency of the title is no ground for relief against a security given for the purchase-money": 2 Kent's Com. 471. See also *Bumpus v. Platner*, 1 Johns. Ch. 213; and *Abbott v. Allen*, 2 Id. 519 [7 Am. Dec. 554]. In this last case, Chancellor Kent examines very fully the authorities, and states the law to be, "that a purchaser of land, who is in possession, cannot have relief in equity against his contract to pay on the mere ground of defect of title, without a previous eviction." A great number of cases in the different states will be found collected in a note to Sugden on Vendors, 681, Perkins's 7th Am. ed., vol. 2, 126. The conclusion from the cases is thus succinctly stated by the annotator: "In some cases it has been held that, although in an action for the price of the purchase of an estate an eviction is not necessary for a defense on failure of consideration from a defect in title, where there has been no conveyance, yet that an actual eviction is necessary to constitute a defense in such case, where a deed has been given and the vendee has entered into possession. The grantee not evicted, but remaining in undisturbed possession, must rely on his covenants, except in case of fraud." The ground upon which the decisions appear to go is, that the bond and mortgage for the payment of the purchase-money, and the covenant of warranty from the grantor, are separate and independent covenants, and the breach of one cannot be urged as a defense to an action upon the other: See the cases of *Tallmadge v. Wallis*, 25 Wend. 107; and *Whitney v. Lewis*, 21 Id. 131.

Applying to the case before us the principles deduced from the authorities, we are of opinion that the covenant in the deed furnishes no ground for the equity claimed in this case against the assignee of the mortgage. We do not mean to express any opinion as to the effect of a payment by the mortgagor of an encumbrance like that of Davis, if this were a suit between the original parties; nor is it necessary to decide what might have been the effect upon this case if the payment had been made by Timms before the assignment. But as the case stands, we are clearly of opinion that the outstanding encumbrance cannot now be urged as a ground of relief against this complainant, who took the assignment before the payment, and consequently before any equity which may have arisen

therefrom existed. The appellant must be left to his remedy at law upon the covenant: See *Middlekauff v. Barrick*, 4 Gill, 290.

The question we have been considering was pressed upon us by the appellants in argument, and although it is not specifically stated in the pleadings, we have deemed it proper to express our judgment upon it, because it arises on the face of the proceedings, and if we had thought the defense a good one, it would have been competent for us, as suggestive at the bar, to remand the cause, to enable the appellants to make the necessary amendments in the pleadings.

In our opinion, the appellants were clearly entitled to the credits of the sums of \$74, and \$175, claimed in their answer; not because they were in themselves proper set-offs in this suit, but because we think the proof established the agreement on the part of Keen, that they should be so applied. That agreement showed an application of those sums by the parties in part satisfaction of the mortgage debt, and constituted them payments *pro tanto*. The testimony of Jones proves that Keen agreed to apply the sum of \$175 as a credit on the mortgage, and the fact that he gave a note or due-bill for the amount constitutes no valid objection to the admissibility of the testimony.

We think there was error in the sum ascertained by the decree to be due the complainant. By an examination of defendants' exhibits W. T. No. 7, and W. T. No. 8, being two of the bonds, it will be seen that Keen's receipts indorsed thereon acknowledge the payment of interest on the bonds which were assigned to Shannon, up to the 1st of August, 1853. The auditor has erroneously charged interest from the first day of August, 1851.

For this error the decree must be reversed, and the cause remanded, in order that a correct account may be stated and further proceedings had in conformity with the opinion of this court.

Decree reversed, and cause remanded.

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WRITTEN CONTRACT CANNOT BE VARIED BY EVIDENCE OF PAROL UNDERSTANDING, in the absence of fraud or mistake: *Martin v. Pensacola etc. R. R.*, 73 Am. Dec. 713, and note; *Conner v. Clark*, Id. 529; *Downie v. White*, 78 Id. 731.

VENDER, WHEN MUST RELY UPON HIS COVENANTS IN CASE OF DEFECT IN TITLE: See *Cooper v. Singleton*, 70 Am. Dec. 333, and note; *Brown v. Manning*, 74 Id. 736.

**MORTGAGE IS MERE SECURITY:** *McMillan v. Richards*, 70 Am. Dec. 655, and note; *Goodenow v. Ewer*, 76 Id. 540; *Johnson v. Sherman*, Id. 481; *Blum v. Walker*, 78 Id. 709; and courts of equity will not permit a conveyance made to secure a debt, to operate for any other purpose: *Washington F. Ins. Co. v. Kelly*, 32 Md. 440, citing the principal case.

**ASSIGNEE OF CHOSE IN ACTION, NOT NEGOTIABLE, TAKES IT SUBJECT TO EQUITIES:** *Central Bank v. Copeland*, ante, p. 597, and note collecting other cases. The principal case is cited in *Marshall v. Cooper*, 43 Md. 61, to the point that the assignee of a thing in action stands in no better position than his assignor, and is subject to the same equitable rights.

**THE PRINCIPAL CASE IS ALSO CITED** in *Grove v. Rentch*, 26 Md. 377, to the point that although relief can be had in equity against a deed or contract in writing, founded on fraud or mistake, still it is essential that the fraud or mistake should be alleged as the ground and object of parol proof; and see *Bladen v. Wells*, 30 Id. 585.

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## STATE EX REL. McCLELLAN v. GRAVES.

[19 MARYLAND, 351.]

**ACT OF OPENING, WIDENING, AND CLOSING STREETS IS EXERCISE OF RIGHT OF EMINENT DOMAIN**, delegated by the legislature of a state to a city, as to other corporations, to be used for purposes of public good. To subordinate it to any private end, would be a perversion of the highest prerogative known to constitutional government.

**POWER OF EMINENT DOMAIN, HOWEVER EXERTED, IS SUBJECT TO CONSTITUTIONAL INHIBITION** that the legislature shall enact no law authorizing private property to be taken for public use, without just compensation being first paid or tendered.

**ASSESSMENT OF BENEFIT DUES ON PROPRIETORS BENEFITED BY STREET IMPROVEMENT IS CONSTITUTIONAL MODE** of providing compensation to owners of land taken for public use; as is also the assessment by commissioners in the city of Baltimore, with the right of appeal to the criminal court.

**COMMISSIONERS FOR OPENING AND WIDENING STREETS OF BALTIMORE HAVING SPECIAL PUBLIC DUTY AND JURISDICTION ASSIGNED THEM**, to be executed in a prescribed form, their proceedings are of a legal character, and must be regarded as subject to all the incidents of proceedings, in the nature of a writ of inquisition *ad quod damnum*, being but means to the same end.

**CONDEMNATION OF PRIVATE PROPERTY TO PUBLIC USE IS NOT COMPLETE** until the proprietor is paid or tendered the value of his property, as ascertained by the inquest or assessment. No preliminary step prior to actual payment or tender, so fixes the condemning corporation as to prevent an abandonment of the condemnation or enterprise.

**PERSONS DEALING WITH COMMISSIONERS FOR OPENING AND WIDENING STREETS, FOR PROPERTY OR MATERIALS PARTIALLY APPROPRIATED TO PUBLIC USE**, deal with them as public officers, acting under the municipal councils, which have the power and the right to abandon any projected improvement, when it becomes obvious that it will not promote the public good.

**PROCEEDINGS OF COMMISSIONERS FOR OPENING AND WIDENING STREETS**, under the ordinance of 1850 of the city of Baltimore, are a substitute for the inquisition of a jury, to ascertain the actual cost of any projected improvement, and have no further effect.

**MUNICIPAL CORPORATION WILL NOT BE COERCED TO ADOPT CONDEMNATION OF PRIVATE PROPERTY** for street improvements, at the instance of purchasers, buying an imperfect title thereunder, with full knowledge of the facts, if the corporation will not be coerced to adopt the condemnation, at the instance of the proprietors, who are unwilling vendors.

**MUNICIPAL CORPORATION CANNOT PASS IRREVOCABLE ORDINANCE**. It cannot abridge its own legislative powers.

**WRIT OF MANDAMUS IS SUMMARY REMEDY, FOR WANT OF SPECIFIC ONE**, where there would otherwise be a failure of justice.

**WRIT OF MANDAMUS IS NOT WRIT OF RIGHT**, and is not granted as of course, but only at the discretion of the court, to whom the application is made; and this discretion will not be exercised in favor of applicants, unless some just or useful purpose may be answered by the writ.

**APPEAL** from an order of the superior court of the city of Baltimore, discharging a rule laid upon the appellees, upon the petition of the appellant, to show cause why a *mandamus* should not issue to compel them to proceed in the opening and widening of a certain street in the city of Baltimore. The facts are stated in the opinion.

*C. F. Mayer and William Schley*, for the appellant.

*I. Nevett Steele*, for the appellees.

By Court, BOWIE, C. J. The mayor and city council of Baltimore, by virtue of authority vested in them by an act of the general assembly, passed at December session, 1838, entitled "An act to vest certain powers in the corporation of Baltimore in relation to streets," on the 21st of October, 1858, passed an ordinance to widen Holliday Street between Baltimore and Fayette streets, and to open a street in continuation of Holliday Street to Exchange Place, and to change the name of Commerce Street to Holliday Street.

The commissioners for opening streets were required to widen Holliday Street from Baltimore to Fayette streets to conform to a new plat then filed in the register's office prepared by the city surveyor, designated as the plat of the proposed opening and widening.

They were also required to condemn and open a street in continuation of Holliday Street, from the south side of Baltimore Street to Exchange Place, to conform to said plat, and to proceed in all respects, in widening and in condemnation



and opening of the street, in continuation of Holliday Street, in accordance with the provisions of an ordinance entitled "An ordinance to provide for exercising certain powers vested in the corporation, in relation to streets, approved April 30, 1850."

The register and collector of the city were required to perform such duties in relation to streets as are required of them by the provisions of the ordinance.

The commissioners, in pursuance of this ordinance, advertised for sale at public auction, on the 31st of January, 1859, on the premises, all the materials in the houses lying and being in the bed of Holliday Street, as contemplated to be opened, and also portions of lots; the said houses and lots being referred to as numbered on the condemnation plat. The advertisement concludes as follows: "The purchaser or purchasers will be required to give bond in double the amount of purchase-money, that the said purchase-money will be paid on the day the said commissioners are prepared to give possession of said property and materials, and that said purchaser or purchasers, respectively, will remove within sixty days thereafter all such materials so sold, and all rubbish occasioned thereby."

At this sale, the relator, Catharine McClellan, purchased part of a lot No. 111 for \$2,050, for which he gave her bond to the mayor and city council, conditioned to pay "on the day that said commissioners are prepared to deliver to her all that piece or parcel of ground designated on the condemnation plat of Holliday Street by the letter E." The relator also purchased materials in the house No. 97, for which she gave her bond, conditioned as above.

The commissioners proceeded to make their assessment of damages and benefits, which was returned to the register of the city; and on the register's proceeding with said return and report of commissioners, as required by law, appeals were entered to the criminal court of Baltimore by persons assessed for damages and benefits, and the return and report were transmitted to said court for adjudication; where, by inquisition of a jury, they were reviewed and considered, and on the 11th of May, 1860, finally confirmed.

On the 6th of October, 1860, the assessment of the jury and judgment of the court were transmitted to the register of the city for his action.

Among other assessments for benefits, the lot purchased by

the relator was assessed \$345.55, of which she had the following notice:—


Folio —. City Taxes, 1860. Wm. T. Valiant, City Collector.  
Catharine M. McClellan,

*To the Mayor and City Council of Baltimore, Dr.*

To benefits assessed on lot No. 111, opening Holliday

Street..... \$345 55

October 8, 1860. Received payment, GEO. M. FORD.

 If this bill be not paid on or before the eighth day of November next, an additional charge will be incurred for advertising notice to owners; and if it be not paid on or before the eighth day of April, 1861, next, the above-described property will be advertised and sold in compliance with existing ordinances.

No. —.

BALTIMORE, October 8, 1860.

Bank of Commerce, pay to the order of W. T. Valiant (collector), three hundred and forty-five and fifty-five hundredths dollars.

\$345.55.

WM. W. McCLELLAN.

Indorsed:

WM. THOS. VALIANT, Collector,

*Per* ROBERT C. BARNES, Cashier.

On the 1st of April, 1861, an ordinance to repeal the ordinance of the 21st of October, 1858, to open Holliday Street, was introduced in the first branch of the city council, and finally passed and approved on the 15th of April, 1861.

It will thus appear, from a comparison of dates, that about thirty months elapsed between the inauguration of, and the final abandonment of the projected improvement of Holliday Street. During all which time the commissioners were not prepared to deliver possession of the lot or houses purchased by the relator. And before the period arrived when property assessed for benefits would be liable to sale for default of payment, viz., 8th of April, 1861, the repealing ordinance was introduced in the lower branch of the city council, and finally passed and approved on the 15th of April, 1861.

The act of opening, widening, and closing streets, is an exercise of the right of eminent domain, delegated by the legislature of the state to the city, as to other corporations, to be used for purposes of public good.

To subordinate it to any private end, would be a perversion of the highest prerogative known to constitutional government. The modes in which this power is exerted vary according to

circumstances. Sometimes it is initiated by summoning a jury upon warrant, in the nature of an inquest *ad quod damnum*; at others, boards of assessors are appointed to appraise dues and benefits, with the right of appeal to a court of record, and of review by a jury. Yet all are subject to the constitutional inhibition, "that the legislature shall enact no law authorizing private property to be taken for public use without just compensation (as agreed upon between the parties, or awarded by a jury) being first paid or tendered to the party entitled to such compensation."

The constitutionality of the act of 1838, chapter 226, and of the ordinance of the city of 1850, No. 17, entitled "An ordinance to provide for exercising certain powers vested in this corporation, in relation to streets," has been affirmed by this court, in the case of *Steuart v. Mayor and City Council*, 7 Md. 500; *Alexander v. Mayor and City Council*, 5 Gill, 383 [46 Am. Dec. 630], and in other cases.

Not only the assessment by commissioners, with the right of appeal to the criminal court of Baltimore, but the assessment of benefit dues on the proprietors benefited, is established as a constitutional mode of providing compensation to owners of land taken for public use. The whole system, in fine, has the sanction of the highest judicial authority of the state: *Steuart v. Mayor and City Council*, 7 Md. 514. The commissioners for opening and widening streets having a special public duty and jurisdiction assigned them, to be executed in a prescribed form, their proceedings are of a legal character, and must be regarded as subject to all the incidents of proceedings, in the nature of a writ or inquisition *ad quod damnum*, being but means to the same end.

The dedication of private property to public use is not complete until the proprietor is paid or tendered the value of his property, as ascertained by the inquest or assessment. No preliminary step prior to actual payment or tender so fixes the corporation as to prevent an abandonment of the condemnation or of the enterprise: *Graff v. Mayor and City Council*, 10 Md. 551; *Baltimore and Susquehanna R. R. Co. v. Nesbit*, 10 How. 895. Persons dealing with commissioners for property or materials partially appropriated to the public use, deal with them as public officers, acting under the municipal councils, which have the power and the right to abandon any projected improvement when it becomes obvious it will not promote the public good. The purchase-money for the property and ma-

terials lying in the bed of the projected condemnation, and sold to the relator, was to be paid on the day the commissioners were prepared to give possession. They could not be prepared until the proprietors were paid, or the damages tendered. No title vested in the mayor and city council until such payment or tender. By the terms of the contract, as evidenced by the advertisement, the purchasers were notified of the contingent character of the transaction, and brought an inchoate interest. The payment of the benefit dues assessed on the lot bought by the relator did not in any way affect the title, but was only a part compliance with the terms of sale as between the commissioners and the relator. The collection of any part or the whole of the benefits assessed, prior to the actual payment or tender to the proprietors of damages assessed, could not change the relation of the mayor and city councils to the proprietors.

The relator in this case has no stronger claims upon the consideration of the court than the petitioner in the case of *Graff v. Mayor and City Council of Baltimore*, 10 Md. 551, the decision of which, based upon that of the supreme court in the case of the *Baltimore etc. R. R. Co. v. Nesbit*, 10 How. 395, seems to us conclusive and controlling.

After quoting the propositions established by the supreme court, viz., that the title to the land condemned did not vest in the company until payment or tender of damages, and that the proprietors could not coerce the company into the adoption of the condemnation, this court proceeds as follows:—

“Now if the title does not vest in the city until payment or tender, and the owner could compel payment by legal process, there would be no mutuality. The city might be required to pay for land that it may never use or need for the purposes of the act. This certainly would be a hardship on the citizens of Baltimore, from which we think they should be relieved, by adopting the interpretation of the supreme court in the case cited.

“This may be a severe system of legislation, as was said, because it places the property owner at the discretion, not to say the caprice, of the other party, by allowing it to condemn and afterwards abandon the property. But this construction is not likely to work so much injustice as that contended for by the appellant, because by the latter, the city is deprived of all choice of location after condemnation is once made and affirmed, no matter how great the necessity might be after-

wards for adopting another, even if the owner of the land condemned had not sustained any damage by the act of the city in making the condemnation.

“The act of assembly has not made the inquisition and confirmation obligatory on the city further than this, that they ascertain the damages to be paid. If there be injustice in this, as alleged in the present case, the fault is in the law, and is not to be imputed to those who administer it”: *Graff v. Mayor and City Council of Baltimore*, 10 Md. 552, 553.

Regarded in their legal character, the proceedings of the commissioners under the ordinance of 1850 are a substitute for the inquisition of a jury, to ascertain the actual cost of any projected improvement, and have no further effect.

If the courts will not coerce the corporation to adopt the condemnation, at the instance of the proprietors, who are unwilling vendors, they would not at the instance of purchasers buying an imperfect title with full knowledge of the facts.

The *mandamus* in Graff's case was to compel the mayor and city council to provide or procure funds for payment of his claims.

In this, the relator prays the collector may be commanded forthwith to proceed to collect the benefit dues remaining unpaid, and those the amounts whereof he may, under the said ordinance for repeal, have refunded, and forthwith advertise for sale to satisfy said dues “as prescribed by the ordinance of 1850,” etc., and in all respects proceed as if said ordinance of repeal had not passed; that the commissioners or appeal tax court proceed as if said ordinance of repeal had not passed, to do all duties and perform all services, and cause to be done all necessary work in removing buildings, and otherwise, for effecting the actual widening and opening of Holliday Street, as required by said ordinance, as if said ordinance of repeal had not passed.

The petition proposes the court should annul the ordinance of repeal, enforce the execution of the ordinance repealed, and compel the city to prosecute a work, the expense of which, in the language of the local legislature, “is largely in excess of what was anticipated at the time of passing the ordinance” repealed, and “greater than any public benefit from the opening and widening of said street as projected by the ordinance, and which will entail a large special tax on the community.”

When it is remembered that the sale under which the relator

claims was required by ordinance No. 17, of 1850, section 7, to be made before the commissioners proceeded to assess the amount of damages and expenses; that those were yet to be ascertained, and the consummation of the contract between the commissioners and the vendees expressly depended upon the ability of the former to deliver possession, which could not be done until the proprietors were satisfied that the mayor and city councils could not know the aggregate of expense until all the preliminaries prescribed by ordinance No. 17 of 1850 had been completed; the reasons for holding all these proceedings as provisional and revocable are obvious and irresistible.

The proposition that any purchaser, under such proceedings, can compel the corporation to persevere in the prosecution of what, in the judgment of its legally constituted directors, is detrimental to the community they represent is so bold and momentous as to require the highest judicial authority to maintain it. The sanctity of contracts is to be upheld and vindicated with the utmost vigilance. However high the contracting parties, none should be permitted to violate them with impunity. But the object and character of the parties entering into it are elements of the contract, and limit its operation.

The mayor and city council are but trustees of the public; the tenure of their office impressed their ordinances with liability to change. They could not, if they would, pass an irrevocable ordinance. The corporation cannot abridge its own legislative powers: *Goszler v. Corporation of Georgetown*, 6 Wheat. 597. Their contracts, when consummated and within their chartered powers, must bind them and their successors, whatever be the consequences.

It is a high exercise of judicial discretion to determine when public policy, justice, and good government require the specific execution of a contract made by municipal corporations, and to enforce the same by summary process. The writ of *mandamus* is a summary remedy, for the want of a specific one, where there would otherwise be a failure of justice: *Runkel v. Winemiller*, 4 Har. & McH. 448 [1 Am. Dec. 411]; *Harwood v. Marshall*, 9 Md. 97. It is based upon reasons of justice and public policy, to preserve peace, order, and good government. It is compared to a bill in equity for specific performance: *Id.*; *Evans's Practice*, 404. Not a writ of right, it is granted not as of course, but only at the discretion of the court to whom the application is made, and this discretion will not be exercised

in favor of applicants, unless some just or useful purpose may be answered by the writ: Angell & Ames on Corporations, sec. 698, and authorities there cited.

If this were, in form and in fact, a bill for specific performance, between individuals or corporations, requiring the exercise of the ordinary powers of a court of equity in such cases, we cannot perceive in the allegations or evidence such circumstances as would entitle the relator to relief.

But when it is an application for summary proceedings against a great municipal corporation, with a local legislature, whose deliberate action it proposes to annul and set aside, and requiring private property to be appropriated to public use, against the expressed will of that public, highways to be opened and buildings to be destroyed in a densely populated city, it does not present those conditions prescribed by the authorities, to entitle it to favor.

It would be perverting the great principle of social organization to require the public good to be sacrificed for the advantage of one or more citizens. If the relator is damnified by the failure of the city to execute its contract, she has an ample remedy at law for any loss she may have sustained. It does not follow, because the contract is not specifically enforced, the parties are released from its obligations.

There are some prominent points of this case, decided by the learned judge below, which we have not enlarged upon. This opinion is so cogent, clear, comprehensive, and well sustained by authorities that it is unnecessary for this court to do more than refer to it as a sound exposition of the law, in which we entirely concur.

Decree affirmed.

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**POWER OF EMINENT DOMAIN IS SUBJECT TO CONSTITUTIONAL INHIBITION** that private property shall not be taken for public use without compensation first paid or tendered: *Bensley v. Mountain Lake Water Co.*, 73 Am. Dec. 575, and note collecting prior cases; *McAulay v. Western Vermont R. R.*, 78 Id. 627; *Powers v. Beers*, Id. 733.

**ASSESSMENTS FOR LOCAL IMPROVEMENTS MAY BE MADE ACCORDING TO BENEFITS:** *Burnett v. Mayor etc. of Sacramento*, 73 Am. Dec. 518, and notes in which prior cases in this series are collected.

**MANDAMUS IS RESORTED TO WHEN THERE ARE NO OTHER ADEQUATE MEANS OF REDRESS:** *Moody v. Fleming*, 48 Am. Dec. 210; *Reading v. Commonwealth*, 51 Id. 534; *Arberry v. Beavers*, 55 Id. 791; *People ex rel. Smith v. Olds*, 58 Id. 398.

**MANDAMUS IS NOT WRIT OF RIGHT:** *Moody v. Fleming*, 48 Am. Dec. 210; *Arberry v. Beavers*, 55 Id. 791. It is only granted at the discretion of the



court, to whom the application is made, and this discretion will not be exercised in favor of applicants, unless some just or useful purpose may be answered by the writ: *Boone v. Humbird*, 27 Md. 4; *State ex rel. Mayor etc. of Baltimore v. Kirkley*, 29 Id. 109, both citing the principal case.

THE PRINCIPAL CASE IS CITED in *Mayor etc. of Baltimore v. Hook*, 62 Md. 377, to the point that the appropriation of private property to public use is not complete until the owner is paid or tendered the value of his property; and no preliminary step prior to actual payment or tender prevents the abandonment of the condemnation or enterprise: Id.; *Norris v. Mayor etc. of Baltimore* 44 Id. 604; in *Mayor etc. of Baltimore v. Clunet*, 23 Id. 464, to the point that an ordinance is not illegal and invalid, because it is taking private property, when not required for public use, when it provides that where necessary in opening streets, a part only of the property shall be taken, used, or destroyed, the commissioners shall ascertain the full value, as if the entire property was to be taken, and pay to the owner the whole of such valuation, and a sale of the portion of the property not needed shall be made; and it is also cited in *Rittenhouse v. Mayor etc. of Baltimore*, 25 Id. 348, as recognizing the principles of the decision in *Presbyterian Church v. Mayor etc. of New York*, 5 Cow. 538, to the effect that although a municipal corporation enters into a covenant, it is not, for that reason, prevented from passing a by-law, or estopped from relying upon it as a defense; but it is distinguished in *Merrick v. Mayor etc. of Baltimore*, 43 Md. 245, as being no authority for the practice of entering a judgment on an inquisition of a jury to try the question of damages for a public improvement.

## PARKHURST v. NORTHERN CENTRAL R. R. Co.

[19 MARYLAND, 472.]

**PRAYER MAY RAISE QUESTION OF LAW OUT OF FACTS ENUMERATED IN IT**, and demand an opinion upon it, not as conclusive of the plaintiff's right to recover, but as ancillary to that right.

**OBJECTION THAT CAUSE OF ACTION WAS NOT SUBMITTED TO COURT AND JURY IS SUFFICIENTLY ANSWERED** by the admission of the defendant at the trial that the debt was due the plaintiff, making it unnecessary for the jury to pass upon the fact thus admitted.

**PRAYER SHOULD NOT BE REJECTED BECAUSE APPARENTLY INDEPENDENT PROPOSITION CONTAINED IN IT IS ERRONEOUS**, when it is limited by another more definite and substantial proposition, with which it is so connected as to form one entire proposition.

**RAILROAD CORPORATION CONVEYS ONLY NET INCOME OF ROAD**, after payment of all expenses, while it remains in no default in paying the interest, and providing a sinking fund, by a mortgage of its entire road, lands, buildings, rolling stock, machinery, etc., together with all its tolls, income, rents, issues, and profits, and alienable franchises, to secure its entire debt, providing that if the interest or principal of its bonds should not be paid when due, the trustees under the instrument were to take possession, work the road, and apply the net income to the payment of the bonds, interest and principal; but that until default in the payment of the interest or principal, the mortgagors should continue in the management of the mortgaged property.

**RAILROAD CORPORATION, HAVING AFFIRMATIVE RIGHT OF POSSESSION AND MANAGEMENT OF ITS ROAD UNDER ITS MORTGAGE, has a legal right to contract for such articles as would enter into the expense of maintaining and operating the road.**

**ATTACHMENT on warrant.** The facts are fully stated in the opinion, with the exception that the mortgage in question conveyed to John Fergusson and Thomas E. Walker, of the city of New York, in trust, "the entire railroad of said company, from its terminus in the city of Pittsburgh, to its terminus in the city of Chicago, and all lands, railways, rails, bridges, fences, rights of way, stations, depot-grounds, station-houses, and other buildings held or owned by said company for the purpose of operating and maintaining their said railroad, or the accommodation of the business thereof, and also all tolls, income, rents, issues, and profits, and alienable franchises of the said party of the first part, connected with their railroad or relating thereto," and also, "all the locomotives or stationary engines, tenders, cars of every kind, machinery, machine-shops, tools, and implements, and materials connected with the proper equipment, operating, and conducting of said railroad, now owned or hereafter to be acquired by the party of the first part." The mortgage further provided that if the interest or principal of its bonds should not be paid as they became due, then the trustees under the instrument were to take possession, work the road, and apply the net income to the payment of the bonds, interest and principal; but that until default in the payment of the interest or principal of the bonds, the mortgagors should continue in the management of the mortgaged premises. The plaintiffs, at the trial, prayed the court to instruct the jury "that by the true construction of the said deed, offered in evidence by the defendant, if the jury shall believe the same was executed, the net income of the road, after payment of all expenses, is alone conveyed by the same; and if the jury shall further believe, from the evidence, that at the time this attachment was sued out, no default of the company to pay the interest to the said mortgagee, and to provide a sinking fund, according to the provision of the said deed in that behalf had taken place, and that the defendant was in possession of the said road and operating the same, that then the said conveyance is no bar to the plaintiffs' recovery in this suit." The court refused to grant the prayer, and this appeal was taken.

*William Price*, for the appellants.

*J. Mason Campbell*, for the appellee.

By Court, GOLDSBOROUGH, J. This was an attachment on warrant, issued out of the superior court of Baltimore city, at the suit of the appellants against the goods, chattels, rights, credits, etc., of the Pittsburg, Fort Wayne, and Chicago Railroad Company, upon a judgment obtained by the appellants against the last-named company, in the district court, and court of common pleas for Allegheny County, Pennsylvania, and laid in the hands of the appellee.

The appellee appeared as garnishee, and pleaded that the defendant was never indebted as alleged, and *nulla bona*. Upon interrogatories propounded by the appellants, the appellee admitted rights and credits of the defendant in its hands more than sufficient to cover the claim of the appellants. These rights and credits arose from the sale of through-tickets, under an arrangement by virtue of which railroad companies have authority to sell through-tickets, reporting the sales monthly, and holding the balance subject to draft at sight.

The appellee, as garnishee, however, relies for defense upon certain mortgages mentioned in the record, by one of which it appears that "all the property and effects of the defendant, including its income, was, at the time when the attachment was laid, under mortgage to John Fergusson and Thomas E. Walker, of the city of New York."

At the trial of the cause, it was admitted and agreed that the debt, for the recovery of which the attachment in this case was sued out, is due to the plaintiffs by the defendant, for oil furnished by the plaintiffs to the defendant, and by the defendant used in the working and use of their railroad.

The appellee offered in evidence the deeds above referred to, especially the deed from the defendant to John Fergusson and Thomas E. Walker, executed on the first day of January, 1857.

The appellants then presented the prayer mentioned in the record, which was rejected by the court; to this rejection the appellants excepted.

Before reviewing the action of the superior court in rejecting the appellants' prayer, we will notice the point made by the appellee, that "it does not appear by the bill of exceptions that the cause of action was submitted to the court or jury,

and therefore, the court could not declare the conveyance no bar to a recovery, when there was nothing to recover on."

It must be observed that the prayer is not an affirmative one, asking the court, from the evidence set out in the prayer, if found by the jury, to instruct them that the plaintiffs are entitled to recover. On the contrary, it was an exercise of the privilege of the plaintiffs, to raise a question of law arising out of the facts enumerated, and to demand an opinion on it: See *Whiteford v. Burckmyer*, 1 Gill, 143 [39 Am. Dec. 640]; not as conclusive of the plaintiffs' right to recover, but as ancillary to that right.

The objection that the cause of action was not submitted to the court and jury, we think is sufficiently answered by the admission of the appellee at the trial, that the debt was due the appellants for oil furnished by them to the defendants. It was, therefore, unnecessary for the jury to pass upon the evidence thus admitted. See *Inloes v. American Exchange Bank*, 11 Md. 185 [69 Am. Dec. 190].

It was contended that the instruction contained in the prayer, that the mortgage did not operate as a conveyance of the gross revenue of the road, was erroneous, and that the prayer for that reason was properly rejected. It is true that this proposition seems to be independent of the more definite and substantial one predicated on the facts submitted in the other portion of the prayer for the finding of the jury; yet as the propositions contained in the prayer are properly connected, we think the first should be construed as limited to a construction of the mortgage before default, and in that sense that it should be considered with the latter as one entire proposition: *Jones v. Horsey*, 4 Md. 305 [59 Am. Dec. 81].

A careful examination of the mortgage deed of the 1st of January, 1857, fully satisfies us that the mortgagors conveyed only the net income of the railroad after payment of all expenses, while they remained in no default in paying the interest and providing a sinking fund.

Whatever might have been the force and effect of those clauses of the mortgage deed which enumerate the class and description of the property conveyed, yet those clauses are controlled by the sixth clause, the concluding part of which must be regarded as an affirmative covenant, amounting to a redemise.

It certainly was the intention of the contracting parties that, until there was a default, the mortgagors, being allowed

to retain possession and have the management of the railroad, should, from its operation and the receipt of the gross income, provide the means to meet their liability as created by the mortgage. Such construction effectuates what to this court appears to have been clearly the intention of the parties. Any other would be productive of injustice; and would be, to place the right of enjoyment and use guaranteed to the mortgagors until default, at the mercy of the mortgagees, without subserving in any manner the interests of the parties for whose security the mortgage was executed. See *Georges Creek etc. Co.'s Lessee v. Detmold*, 1 Md. 225.

With the affirmative right of possession and management of the road, it must follow that the mortgagors had a legal right to contract for such articles as would enter into the expense of maintaining and operating the road. In this case, it is admitted that the claim in dispute is for oil furnished by the appellants to be "used in the working of the railroad."

Judgment reversed, and *procedendo* awarded.

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RAILROAD CORPORATION'S POWER TO MORTGAGE ITS PROPERTY: See *Oss v. Columbus etc. R. R.*, 75 Am. Dec. 518, and note.

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## MONTGOMERY v. MURPHY.

[19 MARYLAND, 576.]

JUDGMENT BY CONFESSION IS AFFIRMATIVE ACT, consented to by the defendant in person, or by his attorneys, with the leave of the court.

COURT WILL NOT SANCTION EXTENSION OF PRACTICE OF CLERKS TO TAKE MINUTES AND DOCKET ENTRIES OF PROCEEDINGS, and to subsequently enter them at length in technical language, according to established forms, to a case in which the clerk made the single entry of "judgment," and then, out of court, fixed the liability of the parties from mere recollections as to how the judgment should be entered at length.

COURT ACTS IN EXERCISE OF ITS QUASI EQUITABLE POWERS IN DECIDING UPON APPLICATION TO STRIKE OUT JUDGMENT after the term is past, for any of the reasons mentioned in the Maryland act of 1787, and will, therefore, properly consider all the facts and circumstances of the case, and require that the party making the application shall appear to have acted in good faith, and with ordinary diligence.

JUDGMENT RECORDS ARE PRESUMED TO HAVE BEEN MADE AFTER MOST CAREFUL DELIBERATION; and to permit them to be altered or amended without the most solemn forms of proceeding would be contrary to law and good policy.

ASSUMPSIT. The opinion states the facts.

*George H. Williams*, for the appellant.

*St. George W. Teakle*, for the appellee.

By Court, GOLDSBOROUGH, J. The appeal in this case was taken from the action of the superior court of Baltimore city, overruling the motion of the appellant to strike out a judgment entered against him in that court, on the fifteenth day of September, 1855.

The motion to strike out the judgment was filed on the ninth day of January, 1857, and the appellant assigned as the reasons for the motion, that the judgment was entered by mistake, and was not the proper judgment to be entered.

We find from the record that the appellee instituted suit against the appellant to recover three thousand dollars for work and labor, and for goods sold and delivered; and that at May term, 1855, the appellant appeared by Messrs. McLean and Williams, as his attorneys, pleaded the general issue and the statute of limitations, and also demanded a bill of particulars.

The cause was continued until the September term following; and though service of the rule, replication, and notice of demand for a bill of particulars was admitted by the attorney for the appellee, no replication was filed nor bill of particulars furnished, but at this term a judgment by confession for the plaintiff was entered and extended.

It appears from the affidavit of F. A. Prevost, that he was a deputy clerk in the clerk's office of the superior court, in the year 1855, at the same time that an entry of judgment was made by Levin Handy, as court clerk in this case; that it was so made without stating on the docket whether it was for the plaintiff or the defendant; that subsequently, after the adjournment of the court, and in the clerk's office, when deponent was about transcribing said judgment in said office on the record docket, he required an explanation of said entry, when he was instructed by Handy to make the entries which are now upon said docket; that the only entry upon said docket, until it came into the clerk's office, was the said word "judgment," and that the other words were not written there until they were so written by this deponent in the office, and not in court, and were so written by the direction of said Handy, as aforesaid. Therefore, the only entry made by the court clerk, in legal contemplation, under the eye of the court, and by its authority, was the word "judgment."

A judgment by confession is an affirmative act, consented to by the defendant in person, or by his attorneys, with the leave of the court. In the affidavits of the defendant and of his attorneys, they utterly deny any such confession; and if any judgment was ordered to be entered, it was more consonant with the state of the pleadings in the cause that it should have been a judgment by default for want of replication and the failure to furnish a bill of particulars.

Though this court has said, in the case of *Weighorst v. State*, 7 Md. 450, "It has always been the habit of clerks to take minutes and docket entries of the court's proceedings, and subsequently to enter them at length in technical language, according to established forms," we cannot sanction the extension of this habit to a case in which the clerk has made the single entry of "judgment," and then, out of court, fixing the liability of plaintiff or defendant from mere recollection as to how the judgment should be entered at length. If the "judgment" had indicated, when placed on the minutes of the court, for or against whom it should have been entered, the recording clerk might, by reference to the character of the action, have followed the recognized forms in making the record complete.

It may be said that the record shows the pleas and demand for bill of particulars were withdrawn. We can only regard such entry as the act of the clerk in making up the record. The character of the pleas, and the settled purpose of the defendant to contest the plaintiff's claim, as shown by the affidavits of the defendant and his attorneys, forbids the idea that the judgment was confessed; and there is no evidence of any order indicating the sum on payment of which the judgment should be released. Is this, therefore, a case within the provisions of the act of 1787, chapter 9?

This court has said, in the case of *Kemp v. Cook*, 18 Md. 139 [79 Am. Dec. 681]: "In deciding upon the application to strike out a judgment after the term is past, for any of the reasons mentioned in the act of 1787, the court acts in the exercise of its *quasi* equitable powers, and will, therefore, properly consider all the facts and circumstances of the case, and require that the party making the application shall appear to have acted in good faith, and with ordinary diligence." "Relief will not be granted when he has knowingly acquiesced in the judgment complained of, or has been guilty of laches and unreasonable delay in seeking his remedy."

In this view of our duty, we have examined the facts of the entry of the judgment, and will now consider the question



whether the appellant has been guilty of laches in making his motion to strike out the judgment.

From the period of the entry of judgment to the time when the motion to strike it out was made, four terms of the court had intervened, and the counsel of the appellee urged upon our consideration that it was the practice of the clerk of the superior court to furnish the attorneys practicing therein with dockets of the respective terms, each docket containing the trial calendar; thus raising the presumption that the appellant's attorneys had an opportunity to know what disposition had been made of this and their other cases.

But there is no evidence whatever in the record to show that the dockets thus distributed were received by the appellant's attorneys, and this presumption of notice is fully rebutted by the affidavits of those gentlemen, in which they severally aver that they only heard of the judgment a few days before the motion to strike it out, and to their great surprise; and the affidavit of the appellant is equally positive in this particular.

The judgment records of the state are presumed to have been made up after the most careful deliberation; and to permit them to be altered or amended without the most solemn forms of proceeding would be contrary to law and good policy.

The act of 1787 authorizes the correction of errors similar to those in this case, and we feel well assured that we are promoting the sanctity of judicial records by granting relief under our *quasi* equitable powers, and the provisions of this act, when such a manifest error is presented for our consideration.

Under the circumstances, the order of the superior court overruling the motion to strike out must be reversed, the judgment stricken out, and the cause remanded, so that the case may be brought up by regular continuances, and prosecuted according to the usual course.

Order reversed, and *procedendo* awarded.

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POWER OF COURT TO CORRECT OR AMEND RECORD: See *Hill v. Hoover*, 69 Am. Dec. 70; *Hollister v. Judges of District Court*, 70 Id. 100; *Raymond v. Smith*, 71 Id. 458; *Kemp v. Cook*, 79 Id. 681, and notes thereto.

THE PRINCIPAL CASE IS CITED in *Sarlonis v. Firemen's Ins. Co.*, 45 Md. 245, to the point that where a judgment has been rendered several terms anterior to the motion to strike it out, it will not be disturbed without clear and convincing proof of fraud, surprise, or irregularity; and in *Wadsworth v. Wilkinson*, 62 Id. 148, to the point that appeals may be taken from refusals to strike out judgments, as well as from orders striking them out; but it was distinguished in *Johns v. Fritchey*, 39 Id. 264, and the court refused to strike out a judgment on the ground of irregularity, under the circumstances of the case, when the entries were made, not in the court-room, but in the clerk's office.

**CASES**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**OF**  
**MASSACHUSETTS.**

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**HADDOCK v. BOSTON AND MAINE RAILROAD.**

[3 ALLEN, 202.]

**DECLARATIONS OF DECEASED MOTHER THAT HER CHILD WAS BORN BEFORE MARRIAGE, and corroborating statements made by her touching the circumstances and history of her life, are admissible in evidence to prove the illegitimacy of the child.**

**EVIDENCE OF GENERAL REPUTATION THAT CHILD WAS ILLEGITIMATE is not competent. The admission of hearsay to prove the pedigree of a person is restricted to the declarations of deceased persons who were related to him by blood or marriage.**

**WRIT of entry.** The demandant claimed under her mother Betsey Frink, who was the daughter of Sarah Pendergrass, a former owner of the premises. At the time of the trial, Sarah Pendergrass and Betsey Frink were both dead. The demandant introduced evidence to show that they had lived together as mother and daughter, and that Sarah had said that Betsey was her daughter. There was no evidence that any one actually knew of her marriage, or that she lived with a husband. The tenants offered to prove a general reputation that Betsey was illegitimate, but the judge excluded it. Sally Goodrich testified on behalf of the defendants that Sarah had often spoken to her of Betsey's illegitimacy, and related the history of her own life; that she came to this country in the war of the Revolution, having eloped with a man to whom she was never married; that she afterwards went to live in a family, and became intimate with one of the sons, by whom she became pregnant with Betsey Frink; that the family turned against her, and she never married, and hardly cared what

became of her after that. The judge instructed the jury that they should give no weight to the declarations of the mother, as testified to by Goodrich, as they were incompetent. The jury found for the defendant. Other facts are stated in the opinion.

*H. Carter*, for the tenants.

*D. Saunders, Jr.*, for the demandant.

By Court, METCALF, J. The evidence which was offered by the demandant at the trial, to prove that her mother, Betsey Frink, was the daughter of Sarah Pendergrass, was admitted without objection thereto by the tenants, and must now be supposed to have satisfied the jury of that fact. Assuming that fact, one of the questions in the case is, whether the jury were rightly instructed that the said Sarah's declarations as to the illegitimacy of the demandant's mother were incompetent evidence, to which no weight should be given. The court are of opinion that this instruction was wrong.

If Sarah Pendergrass were alive she would be competent, in the trial of a case involving her daughter's legitimacy, to testify to her illegitimacy, by testifying that she (Sarah) was never lawfully married: *Raynham v. Canton*, 3 Pick. 293; *Standen v. Edwards*, 1 Ves. Jr. 133; *King v. Bramley*, 6 Term Rep. 330. In this last case, it was said by Lord Kenyon that parents may be called as witnesses to prove their children illegitimate as well as to prove them legitimate. That remark is true when applied to that case and to the present case. When a witness, acknowledged or proved to be the parent of a child whose legitimacy is in question, is called to prove the child's illegitimacy, such witness may prove it by testifying that he or she was not married before the birth of the child. But the remark must be confined to cases of children not born in lawful wedlock. When parties are lawfully married, neither of them can be allowed to testify that the offspring of the mother is spurious: *Goodright v. Moss*, 2 Cowp. 592, by Lord Mansfield; *Canton v. Bentley*, 11 Mass. 442, 443; 1 Greenl. Ev., secs. 253, 344.

Sarah Pendergrass being dead, her declarations that her daughter was illegitimate were admissible, as proof of pedigree. This precise point was adjudged in *Goodright v. Moss*, 2 Cowp. 591. That was an action of ejectment, in which the only question was, whether the lessor of the plaintiff was the

legitimate son of Francis and Mary S., or was born of Mary before her marriage to Francis. At the trial the defendants offered witnesses to general declarations of Francis and Mary (both deceased), that the plaintiff's lessor was born and privately baptized before the marriage; also, an answer that Mary had made to a bill in chancery, in which she declared that he was born before her marriage. Both of these matters of evidence were excluded; but a new trial was granted for the reason that they ought to have been admitted.

We understand, from the concluding part of this bill of exceptions, that the court, at the suggestion of the demandant's counsel, assented to a change in the instructions that had been given, so far as to authorize the jury to take into consideration as competent evidence the testimony of Sarah Goodrich to the bare declarations of Sarah Pendergrass that her daughter was illegitimate, excluding from their consideration the other parts of her testimony. But this does not relieve the demandant's case. For we are of opinion that the whole of her testimony was competent. The whole of it was received at the trial, without any objection from the counsel of the demandant, until the court had instructed the jury that all of it was incompetent, and to be disregarded, when the counsel interposed, and desired that only the narrative part thereof should be declared incompetent. The counsel seems to have thought then, as we think now, that the jury had been misinstructed, and therefore he sought for such a modification of the instructions as might possibly prevent the tenants from obtaining a new trial, if the jury should find against them.

The other question in the case is, whether the testimony offered by the tenants to prove a general reputation that the demandant's mother was an illegitimate child of Sarah Pendergrass was rightly excluded. We think it was. And the tenants' counsel has not attempted to support the exception taken to its exclusion.

The admission of hearsay to prove the pedigree of a person is restricted to the declarations of deceased persons, who were related to him by blood or marriage: 1 Greenl. Ev., sec. 103, and cases there collected. And "reputation," says Le Blanc, J. (*Higham v. Ridgway*, 10 East, 120), "is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another."

**Exceptions sustained.**

DECLARATIONS OF DECEASED MEMBERS OF FAMILY ARE ADMISSIBLE AS TO PEDIGREE: See *Craufurd v. Blackburn*, 77 Am. Dec. 323, note 328, where other cases are collected. But the testimony of a mother that her child born in wedlock was, nevertheless, illegitimate, cannot be received: *Abington v. Duxbury*, 105 Mass. 290, citing the principal case.

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## SAWYER v. HOVEY.

[8 ALLEN, 831.]

TO SUSTAIN BILL IN EQUITY TO REFORM DEED ON GROUND OF MISTAKE, the proof that it does not conform to the oral contract, as understood by the parties, must be entirely exact and satisfactory.

BILL to obtain a decree to reform a deed. The opinion states the case.

*J. C. Perkins*, for the plaintiffs.

*S. H. Phillips*, for the defendant.

By Court, MERRICK, J. The plaintiffs in this suit seek to obtain a decree to reform the deed mentioned in the bill from them to the defendant, on account of an alleged mistake in the description of the land intended to be conveyed by it.

When, in equity, mistake of the parties is expressly charged and put in issue, equity will permit it to be inquired into, and upon strong satisfactory proof, to be corrected: *Canedy v. Marcy*, 13 Gray, 373. This is the only principle upon which the bill can be maintained. The fact of mistake is to be distinctly charged, and then clearly and fully proved. It is laid down as an established rule that relief will be granted, in cases of written instruments, only where there is a plain mistake, clearly made out by satisfactory proofs: 1 Story's Eq. Jur., sec. 157; *Gillespie v. Moon*, 2 Johns. Ch. 585 [7 Am. Dec. 559]. And it is a further and very material rule that the court will not afford its aid, or allow a written instrument to be affected by parol or other extrinsic evidence, unless the mistake is made out according to the understanding of both parties, by proof that is entirely exact and satisfactory: *Andrews v. Essex Ins. Co.*, 3 Mason, 10. And this, for the paramount reason that otherwise if a deed should be reformed and corrected upon proof of the mistake of one of the parties, the great injustice might be done of imposing upon the other the consequences of a contract to which he had never assented, and therefore wholly against his will.

Applying the rule that the written instrument must be clearly proved to vary from the real contract between the parties, as it was understood by each of them, to the evidence produced at the hearing, we find it impossible to come to the conclusion that the bill can be maintained. The alleged mistake consists in this, that the description in the deed covers a greater quantity of land than was intended to be conveyed,—more than the plaintiffs meant to sell, and more than it was the understanding of the defendant that he had purchased. The grantors and the grantee were the only material witnesses in the case. The deed describes the western boundary of the land conveyed as a line beginning at a point on the highway 150 feet from certain bars, “thence southerly in as straight a line as possible over the highest part of said hill to a large white-pine tree.” Each of the plaintiffs testified that, according to the contract, and their distinct understanding of it, the western boundary was to be an absolutely straight line from the point on the highway to the pine-tree named; that they sold and intended to convey no land lying on the west of any part of such absolutely straight line. And they stated many facts and circumstances which occurred during the negotiation, tending to confirm their confidence in the accuracy of their recollection concerning this boundary. But the defendant testified with equal positiveness that in all his negotiations with the grantors he understood and explained to them that he must have the whole of the eastern slope of the hill, and that he believed that they so understood it. He further testified that he caused the deed to be prepared according to that understanding; that it was then submitted to them for their examination and approval; that they afterwards signed and executed it in his absence, and then returned it to him without any suggestion that it was in any respect different from the contract, or from what they intended that the description in the deed should be. He also testified that after it was delivered to him, and after he came into possession of the land, he entered upon that portion of it which is included within the lines which are the subject of controversy, and blasted a large quantity of stone there without any objection from them; and that he never knew that there was any misunderstanding about the line until about ten years after he came into possession of the land under the deed.

This evidence is conflicting. All the witnesses are admitted to be persons of business, of intelligence, and respectability.

Neither party has made any suggestion against the general reputation of the other as credible witnesses. The conflict in their statements can be accounted for only upon the supposition that there was, originally, a serious misunderstanding between them, or that on one side or the other there is a misrecollection of what actually occurred during the previous negotiation and at the time of the consummation of their bargain, by the execution and delivery of the deed. Upon either supposition, the result is the same. For, if parties understand an agreement differently, and neither of them makes known to the other his construction of it, and it is afterwards reduced to writing and duly executed, they are both bound, in equity as well as at law, by the terms of the written instrument, which in such cases is to be construed by the court: *Miller v. Lord*, 11 Pick. 24. And as to the fact itself, it cannot be said to be plainly and clearly proved that the alleged mistake actually occurred, while all the evidence relating to the question is conflicting and contradictory. There is nothing which can be said to be absolutely certain concerning the transaction except what is written in the deed.

The case, therefore, which the plaintiffs are required by the rules and principles of law applicable to such subjects to establish, in order to entitle themselves to relief, has not been shown by that degree and amount of evidence without which the written instrument must be regarded as the conclusive statement and exposition of the contract between the parties; and the bill must accordingly be dismissed.

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POWER OF EQUITY TO REFORM DEEDS AND CONTRACTS: See *Thompson v. Marshall*, 76 Am. Dec. 328, note 332; *Dunham v. Chatham*, 73 Id. 228, note 235; *Price v. Cutts*, 74 Id. 52, note 58; *Greer v. Caldwell*, 58 Id. 553, note 559; *McElderry v. Shipley*, 56 Id. 703, note 706; *Leitenedorfer v. Delphy*, 55 Id. 137, note 141, where other cases are collected. The mistake for which equity will reform a contract must be a mistake of both parties, and must be about the very subject of the contract: *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 48; *Clark v. Higgins*, 132 Id. 590, both citing the principal case. It must appear beyond a reasonable doubt that the precise terms of the contract had been orally agreed upon between parties, and that the written instrument afterwards signed fails to be, as it was intended, an execution of the previous agreement, but expresses a different contract; and that this is the result of mutual mistake: *German American Ins. Co. v. Davis*, 131 Id. 817, also citing the principal case.



## SILVER v. FRAZIER.

[3 ALLEN, 382.]

**FALSE STATEMENTS FURNISH NO CAUSE OF ACTION**, if they relate to matters concerning which the person to whom they are made, by the use of ordinary care and attention, can obtain full and accurate information. And therefore the owner of land who has directed his agent to erect a house at a particular place on it cannot maintain an action against a third person who by false representations as to the true boundary line of the land has induced such agent in the owner's absence to erect the house at a different place.

**WHERE LOSS OR INJURY COMPLAINED OF IS NOT DIRECT AND IMMEDIATE RESULT** of the defendant's wrongful act, no action can be maintained.

**TORT.** The first count was in trespass. The second count was in these words: "The plaintiff also says that he employed a carpenter, one Ira P. Brown of said Lynn, to prepare or cause to be prepared a spot which was designated by the plaintiff, to dig and finish a cellar, and to erect and finish a dwelling-house thereon, on the plaintiff's land in said Lynn, for and on account of the plaintiff; that the plaintiff shortly afterwards went on a voyage to sea; that while so absent at sea, the said Brown, acting for the plaintiff, prepared the spot designated, caused a cellar to be dug and stoned up, and when he was about placing the dwelling-house thereon the defendant falsely represented to the said Brown that the true division line between the land of plaintiff, on which said cellar was dug, and that of the adjoining owner, which was either the defendant's or had just been sold by him to one Hatch, ran about a foot nearer to the said cellar than it did in point of fact, and that the said house when built thereon would encroach upon the adjoining premises of defendant or his grantee, though the defendant knew at the time that the said line did not run as represented by him, but did run at a sufficient distance from said cellar to avoid any encroachment by the house to be erected thereon upon the said adjoining land; and the defendant, knowing of the absence of the plaintiff, and taking advantage thereof, intended by said representations to induce and did induce the said Brown, the plaintiff's agent, to abandon the said spot on which he was directed by the plaintiff to erect the said dwelling-house, and to fill up the cellar he had dug, and to place the said dwelling-house upon another more inconvenient and far less favorable part of the plaintiff's land; and the said Brown did so act and change the location of said house by reason of the said representa-

tions of the defendant, to the great damage and injury of the plaintiff." On the trial, the judge ruled that no cause of action was set out in the second count, and declined to admit any evidence under it.

*J. C. Perkins*, for the plaintiff.

*W. Howland*, for the defendant.

By Court, BIGELOW, C. J. No cause of action is set out in the second count of the declaration. Putting aside all other difficulties in the way of sustaining the plaintiff's case on the facts alleged, it appears to us that there are two obvious and insurmountable obstacles to the maintenance of the action. The first is, that the subject-matter of the alleged false representations is one concerning which it must be presumed, in the absence of averments to the contrary, that the plaintiff and his agent had ample opportunity, by the use of due care and diligence, of obtaining information and discovering the exact truth. It is not alleged that the boundaries of the plaintiff's land were peculiarly within the knowledge of the defendant, or difficult of being ascertained by the use of means within the reach of the plaintiff's agent to whom the statements of the defendant were made, if he had exercised ordinary vigilance. The presumption is certainly a reasonable one than an owner of land, by reference to his title deed, or his agent in his absence, by a recourse to the record, can readily ascertain its true description and boundaries, and apply them by the most simple method to the earth's surface so as to fix with certainty the extent of his title. If he or his agent omits these ordinary precautions and relies on the statements of others, by which he is deceived or misled, no action can be maintained for any loss or injury which may follow. Such a case comes within the principle that false statements furnish no cause of action, if they relate to matters concerning which the persons to whom they are made, by the use of ordinary care and attention, can obtain full and accurate information. The law will not relieve those who suffer damages by reason of their own negligence or folly. It is on this ground that no action will lie to recover damages for representations concerning the value of property which is the subject of sale, or in relation to its qualities or characteristics, when they are open to the vendee, and can be readily discovered by inspection or examination: *Nowlan v. Cain*, 3 Allen, 263, 264.

The other objection to the maintenance of the action is, that the alleged loss or injury suffered by the plaintiff is not the direct and immediate result of the defendant's wrongful act. Stripped of its technical language, the declaration charges only that the agent employed by the plaintiff to do a certain piece of work disobeyed the orders of his principal, and was induced to do so by the false statements of the defendant. In other words, the plaintiff alleges that his agent violated his duty and thereby did him an injury, and seeks to recover damages therefor by an action against a third person, on the ground that he induced the agent by false statements to go contrary to the orders of his principal. Such an action is, we believe, without precedent. The immediate cause of injury and loss to the plaintiff is the breach of duty of his agent. This is the proximate cause of damage. The motives or inducements which operated to cause the agent to do an unauthorized act are too remote to furnish a good ground of action to the plaintiff. The difficulty is not that there is a want of privity between the parties. No such element is essential to enable a party injured to recover damages occasioned by a tort. It is sufficient, in support of an action for deceit, to show that the false statement was made with a knowledge that it was to be acted on by the party injured, and that the act produces damage, although the representation was made to an intermediate person. This is settled by the leading case of *Langridge v. Levy*, 2 Mees. & W. 519; S. C., 4 Id. 337; and other cases of a similar nature which have followed it. In such case, the damage is the direct and immediate result of the fraud. But in the case at bar, the damage which the plaintiff has sustained is only the remote and consequential result of the alleged false statement of the defendant.

Exceptions overruled.

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FALSE REPRESENTATIONS WILL NOT AVOID CONTRACT, if each party to it had equal means of ascertaining the facts: See *Bell v. Ryerson*, 77 Am. Dec. 142, note 144, where other cases are collected; *Fulton v. Hood*, 75 Id. 664, note 672.

NATURAL, PROXIMATE, AND LEGAL RESULTS are all that damages can be recovered for: See *Patch v. City of Covington*, 66 Am. Dec. 186, note 191, where other cases are collected.

THE PRINCIPAL CASE IS DISTINGUISHED in *May v. Western Union Telegraph Co.*, 112 Mass. 95.

**TOWER v. PRESIDENT, DIRECTORS, AND COMPANY  
OF APPLETON BANK.**

[3 ALLEN, 387.]

**OWNER OF BANK BILLS, INCAPABLE OF BEING DISTINGUISHED** from other similar bills, cannot maintain an action against the bank that issued them, upon merely circumstantial evidence that they have been destroyed, and the tender of a bond of indemnity.

**CONTRACT** to recover the amount of sundry bank bills issued, by the defendant, and alleged to have been destroyed by fire. The evidence tended to show that the plaintiff left the bills in his trunk in a house in Chicago, which was burnt within an hour afterwards, and that no person entered the room after he left it, and that the trunk and its contents were burnt with the house. The judge instructed the jury that if the plaintiff was the owner of the bills, and they were destroyed by fire, and the plaintiff notified the defendants and demanded the amount thereof, and tendered a bond of indemnity, he was entitled to recover. The jury found for the plaintiff.

*D. S. and G. F. Richardson*, for the defendants.

*T. Wentworth and T. Pearson*, for the plaintiff.

By Court, HOAR, J. The reasons upon which it has been held that the owner of a negotiable promissory note, which is lost or destroyed, may maintain an action upon it against the maker, although it may have been indorsed in blank; and therefore made transferable by delivery, were stated in the case of *Fales v. Russell*, 16 Pick. 315. The general doctrine is, that where a writing is evidence of a contract, the loss or destruction of the writing does not destroy the cause of action, and that secondary evidence of the contract is admissible. The objection to the application of this doctrine to the case of a negotiable bill or note, payable to bearer, or payable to order and indorsed in blank, is given in *Hansard v. Robinson*, 7 Barn. & C. 90. Lord Tenterden there says: "The general rule of the English law does not allow a suit by the assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes, in this case, an exception to the general rule. What, then, is the custom in this respect? It is that the holder of the bill shall present the instrument at its maturity to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill. The acceptor, paying the bill, has a right to the possession of the instrument

for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer or retain his money?" This was the case of an indorsee against the acceptor of a lost bill of exchange; and the judgment of the court was, that the plaintiff's only remedy was in equity, where the court could provide for an adequate indemnity to the defendant as a condition of payment. And such has been the rule in England in the case of lost notes, until it was modified by statute. The statute of 9 & 10 Wm. III., c. 17, sec. 3, provided in the case of inland bills expressed to be for value received, and payable after date, "that in case any such inland bill or bills of exchange shall happen to be lost or miscarried within the time before limited for payment of the same, then the drawer of the said bill or bills is, and shall be, obliged to give another bill of the same tenor with those first given; the person or persons to whom they are and shall be so delivered giving security, if demanded, to the said drawer, to indemnify him," etc. The statute of 17 & 18 Vict., c. 125, sec. 87, contains the more extensive provision that, "in case of any action founded upon a bill of exchange, or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge, or a master, against the claims of any other person upon such negotiable instrument."

But without any statute provision, the case of *Fales v. Russell*, 16 Pick. 315, is an authority to show that in this commonwealth the plaintiff, in the case of a note lost or destroyed, will not be required to resort to a court of chancery for a remedy; but that a court of law, while it fully recognizes the right of the defendant to the security which the production and giving up of the negotiable instrument declared on would afford, has authority to prescribe an equivalent security, by a sufficient and reasonable indemnity: *Almy v. Reed*, 10 Cush. 421. It has been held otherwise in New York: *Rowley v. Ball*, 3 Cow. 303 [15 Am. Dec. 266].

Whether the same rule is applicable to bank notes, intended to circulate, and actually circulated as currency, is the question presented by the case at bar; and we believe it has never been decided in this commonwealth. Although a bank note is the promissory note of a corporation, it differs in some im-

portant respects from other promissory notes. It is intended not merely as the evidence of a single contract, to become worthless when that contract is performed, but to be issued repeatedly, and to pass from hand to hand with the utmost freedom. They are commonly made upon paper of a peculiar quality, embellished and distinguished by vignettes and other ornamental engraving; and are of some value to the bank which issues them. In *People v. Wiley*, 3 Hill, 194, it was held that bank notes prepared for issue, but still in the possession of the bank, were the subject of larceny. It was said by Mr. Justice Wilde, in *Hinsdale v. Larned*, 16 Mass. 68, that "there can be no great doubt that the statute of limitations is not applicable to demands on bank notes, where the action is brought against the corporation; because the circulation of such notes is daily renewed; and because lapse of time is no presumption of payment, these notes never being paid, unless given up by the holder at the time of payment." This was so fixed by statute afterward: R. S., c. 120, sec. 4. Whether payment can be enforced without a previous demand at the bank, if no place of payment be stipulated in the note, is a question which we believe has never been determined in this commonwealth. In Maine, it has been decided that they do not differ in this respect from other promissory notes payable on demand, and that the commencement of the action is a sufficient demand: *Bryant v. Damariscotta Bank*, 18 Me. 240. The same opinion was given in the supreme court of New York by Woodworth, J., in *Bank of Niagara v. McCracken*, 18 Johns. 493; but in *Jefferson County Bank v. Chapman*, 19 Id. 322, the same judge observed that this was only his individual opinion, and was not decided by the court. In *Haxtun v. Bishop*, 3 Wend. 21, Chief Justice Savage expressed the same opinion; but the point was not essential to the decision of the case.

Some implication that the legislature regard the right of a bank to the possession of its bills, as a condition of paying them, to be different from that of the maker of an ordinary promissory note, may, perhaps, be found in the provision in statutes of 1859, c. 116, sec. 1, "that banks may replevy their bills upon payment or tender of the amount due upon them": Gen. Stats., c. 57, sec. 65. And a similar inference might be drawn from the provision that banks shall be subject to a penalty for not paying bills presented at their banking-house in business hours; as if this were regarded as the breach of the contract with the bill-holders: Gen. Stats., c. 57, sec. 59.

The case of *Hinsdale v. Bank of Orange*, 6 Wend. 378, was an action to recover upon bank notes which had been cut in two for the purpose of transmission through the mail, and one half of them lost. The plaintiff was allowed to recover, on the ground that by severing the notes their negotiability was destroyed. But Mr. Justice Marcy took a distinction between the loss and the destruction of a note, and said: "If the owner of a bill loses it, he cannot recover; but if he can prove that it is actually destroyed, he may."

In *Bullet v. Bank of Pennsylvania*, 2 Wash. C. C. 172, a similar decision was given by Mr. Justice Washington; and again, upon a very full discussion, in *Martin v. Bank of United States*, 4 Id. 253. In each of the two latter cases, no distinction is made between a bank note and any other promissory note payable to bearer; but the general principle is asserted: 1. That the note is only the evidence of the contract, the loss or destruction of which may be supplied by secondary evidence; and 2. That if upon any other ground than fraud or perjury the maker might be subject to be twice charged, the plaintiff should not be allowed to recover, except upon furnishing an adequate indemnity,—which could only be provided by a court of equity.

But aside from any specific distinction applicable to all bank bills issued as currency, there is a difficulty in the plaintiff's case as presented upon the facts reported. The evidence of the destruction of the bills is merely circumstantial, and not positive. Upon the doctrine of *Fales v. Russell*, 16 Pick. 315, the plaintiff, by his own negligence or misfortune, is unable to do what it was the right of the defendants to require, for their own security, namely, to give up the bills when paid. If the bills were shown to be actually destroyed, beyond all question or controversy, the case might be different; as, for instance, if the destruction were admitted by the pleadings. But upon the mere preponderance of proof, which is sufficient to authorize a jury to find a fact in issue, we think it is not to be assumed conclusively that the bills are destroyed, without further provision for the defendants' security against their reappearance. If, then, it is sought to provide this security by a bond of indemnity, how can such a bond be given? There is nothing to distinguish or identify the bills which the plaintiff says have been destroyed. Against a second payment of what bills are the defendants to be indemnified? How could they show that any bills already redeemed, or hereafter to be redeemed,



were or were not the bills in question? Clearly there could be no mode of determining the fact, until their whole circulation of bills of the same denomination should be called in. But suppose that several parties should sue upon bills alleged to have been destroyed, and should recover, each giving a bond of indemnity. If it should afterward appear that all the bills had not been destroyed, upon which bond would the defendants have a remedy?

The answer given to this objection by the plaintiff's counsel is, that the defendants issue bills in such form as they choose, and that the plaintiff should not be prejudiced because they are issued in such a form as not to be distinguished from each other. But this is not a satisfactory answer. The defendants have not contracted to redeem their bills, except upon their production and delivery; and it is the negligence or misfortune of the plaintiff that they cannot be produced. The plaintiff is then bound to furnish an equivalent, — to put the defendants in as good a condition as if the bills were produced. If he cannot do this, he has no right to shift the consequences of the loss upon a party in no wise answerable for it. It is deserving of consideration, also, that the defendants do not stand upon any equality with the plaintiff in the trial of the question whether the bills are really destroyed. The plaintiff is a competent witness for himself; and the production by the defendants of any number of bills exactly like those said to be destroyed would be no defense, unless the whole issue of such bills were accounted for.

Upon the whole matter, the court are of opinion that to permit a plaintiff to recover upon such proof as this case presents, upon bills circulating as currency, and available to any one taking them *bona fide*, without such means of distinguishing the particular bills as would admit of an adequate indemnity, would open a wide door to fraud, would be incompatible with the reasonable security and rights of the defendants, and is not required by law.

Exceptions sustained. —

DESTROYED BANK NOTE, WHEN RECOVERY MAY BE HAD ON: See note to *New Hope Delaware Bridge Co. v. Perry*, 52 Am. Dec. 450; note to *Edwards v. McKee*, 13 Id. 482. In *Ross v. Bank of Burlington*, 15 Id. 684, it was decided that if bank notes are destroyed, the owner may recover their amount in an action at law.

ACTION AT LAW ON LOST PROMISSORY NOTE MAY BE MAINTAINED whenever a bond of indemnity will afford a complete protection to the defendant: *Tuttle v. Standish*, 4 Allen, 481; S. C., *post*, p. 712; *McGregory v. McGregor*, 107 Mass. 547; *Tucker v. Tucker*, 119 Id. 81, all citing the principal case.

**HELAND v. CITY OF LOWELL.**

[8 ALLEN, 407.]

**INHABITANT OF CITY WHO WAS DRIVING AT RATE FASTER THAN WALK,** in violation of a city ordinance, over a bridge which the city was bound to keep in repair, at the time when he received an injury by reason of a defect in the bridge, cannot maintain an action against the city for damages, although he was ignorant of the existence of the ordinance.

**ORDINANCE WHICH MUNICIPAL CORPORATION IS AUTHORIZED TO MAKE** is as binding upon its members and all other persons as any statute or other law of the commonwealth, whether they have knowledge of its existence or not.

**WHEN PLAINTIFF'S OWN UNLAWFUL ACT CONCURS IN CAUSING DAMAGE** of which he complains, he cannot recover compensation for such damage.

**QUESTION WHETHER PLAINTIFF WAS INTOXICATED OR NOT WHEN DRIVING ACROSS BRIDGE** at a rate faster than a walk, in violation of a city ordinance, is immaterial, in an action against the city to recover damages for an injury received by him by reason of a defect in the bridge.

**TORT** to recover damages sustained by reason of a defective bridge which the defendant was bound to keep in repair. The plaintiff introduced evidence tending to prove that while driving over the bridge at a rate no faster than a walk, his horse stepped into a hole in the floor and fell, whereby the plaintiff was thrown forward and injured. The defendant then introduced evidence tending to show that at the time he received the injury the plaintiff was intoxicated, and was driving over the bridge at a rate faster than a walk, in violation of a city ordinance. To rebut the evidence of intoxication, the plaintiff offered evidence of his general character at that time as a sober and temperate man. The judge rejected the evidence, and ruled that if the plaintiff was driving at a rate faster than a walk, in violation of the city ordinance, at the time of receiving the injury, he could not recover, although he was using due care in other respects. The jury found for the defendant.

*W. P. Webster*, for the plaintiff.

*A. R. Brown*, for the defendant.

By Court, METCALF, J. The jury were rightly instructed that if the plaintiff, when the accident happened, was driving his horse across the bridge at a rate faster than a walk, he was not entitled to recover. A by-law or ordinance which a corporation is authorized to make is as binding on its members, and all other persons, as any statute, or other law of the commonwealth: *Commonwealth v. Worcester*, 3 Pick. 462; *Vandine, Petitioner*, 6 Id. 187 [17 Am. Dec. 351]; Angell & Ames on Corpo-

rations, 7th ed., sec. 325; Grant on Corporations, 77. And the plaintiff does not deny the authority of the defendants to make the ordinance in question. But he denies that he was bound by it, unless he had knowledge of its existence; which knowledge the case does not show that he had. This position cannot be maintained. The plaintiff was bound to take notice of the ordinance,—especially as it appears by his writ that he was an inhabitant of Lowell; and if he had been sued for the penalty for violating it, it would not have been necessary to allege notice in the declaration: Grant on Corporations, *ubi supra*; *Pierce v. Bartrum*, Cowp. 270; *James v. Tutney*, Cro. Car. 498; *Master etc. of Butchers' Co. v. Bullock*, 3 Bos. & P. 442.

It was said by the court in *Worcester v. Essex Merrimack Bridge Corp.*, 7 Gray, 459, that if the plaintiff in that case was, at the time of the accident, violating a public statute, or a by-law of which he had actual or constructive notice, he could not recover damages for the accident. And it is the established law that when a plaintiff's own unlawful act concurs in causing the damage that he complains of, he cannot recover compensation for such damage: *Bosworth v. Inhabitants of Swansea*, 10 Met. 363 [43 Am. Dec. 441]. The question, therefore, whether the plaintiff was, or was not, intoxicated when driving across the bridge, was immaterial; and so the judge treated it in his instruction to the jury. But if it had been material, the evidence which was offered, that his general character was that of a temperate and sober man, would have been inadmissible: *Commonwealth v. Worcester*, 3 Pick. 462; *Tenney v. Tuttle*, 1 Allen, 185.

Exceptions overruled.

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LEGISLATURE MAY DELEGATE TO MUNICIPAL CORPORATIONS POWER TO ENACT ORDINANCES which will have the force and effect of general laws within the territory or over the community for whose government they are adopted: See note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 632. A city ordinance prohibiting the driving of any vehicle in the streets of the city at a greater rate of speed than six miles per hour is binding upon all persons driving within the city as much as any statute or other law of the commonwealth; and to drive faster than the prescribed rate is a violation of law: *Tuttle v. City of Lawrence*, 119 Mass. 278, citing the principal case.

WHERE PARTIES HAVE RECIPROCALLY VIOLATED LAW, neither is entitled to damages: *Barrow v. Landry*, 77 Am. Dec. 199. Courts of justice will not assist a person, who has participated in a transaction forbidden by statute, to assert rights growing out of it: *Harris v. Hatfield*, 71 Ill. 301, citing the principal case. A person driving across a bridge, unlawfully, faster than a walk cannot recover for a defect in the bridge caused by a hole in the floor,

into which the horse steps and is injured: *Smith v. Boston and Me. R. R.*, 120 Mass. 492, also citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED IN *McCarty v. Leary*, 118 Mass. 510, to the point that it is not competent for a party plaintiff to introduce evidence of his own reputation for sobriety, or his character and habits in that respect, for the purpose of proving that he was not drunk at the time when an alleged assault was made upon him.

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## WHITHEAD v. KEYES.

[8 ALLEN, 495.]

**REFUSAL OF JUDGE TO ALLOW DEPOSITIONS USED ON TRIAL TO BE DELIVERED TO JURY**, on their retiring to consider their verdict, is not a legal ground of exception. It is a matter resting in his discretion.

**SHERIFF'S RETURN OF RESCUE ON WRIT IS NOT CONCLUSIVE EVIDENCE IN HIS FAVOR**, in an action against him for an escape.

**OFFICER IS NOT BOUND TO CALL FOR AID IN SERVICE OF MESNE PROCESS**, and is not liable for an escape that might have been prevented by his calling for aid, if the party arrested by him rescues himself or is rescued by others.

**OFFICER IS BOUND TO USE ALL REASONABLE AND PROPER EXERTIONS TO SECURE ARREST** of a person for whose arrest he has a writ, and if the jury believe that he has not done so, he may be held liable for an escape, although he used all such exertions as he deemed necessary at the time.

**OFFICER EFFECTS ARREST OF PERSON WHOM HE HAS AUTHORITY TO ARREST**, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him.

TORT against the sheriff of Middlesex County for the default of his deputy. The deputy returned a rescue upon the writ, and the defendant contended that this return was conclusive; but the judge ruled that it was not conclusive, but was evidence for the consideration of the jury. The judge also ruled, against the defendant's objections, that certain depositions which had been read in evidence by the defendant should not be delivered to the jury when they retired to consider of their verdict. The defendant requested the court to instruct the jury that the officer, although he might call for aid in arresting Stoddard, the defendant in the writ was not bound to do so. But the judge declined to so rule, and instructed them that the officer had the power to call for aid, and it was for them to determine whether, under the peculiar circumstances of the case, he ought not to have done so, and whether if he had done so he could have succeeded in detaining Stoddard, and whether or not it showed negligence in not calling for aid. The defendant also requested the court to in-

struct the jury that he would not be liable for an escape, provided the officer used all such reasonable and proper exertions as he deemed necessary to secure Stoddard. The judge declined so to rule, but instructed the jury on this point as stated in the opinion. The defendant also requested the court to instruct the jury that if the hold taken of Stoddard by the officer was only for an instant, and Stoddard broke away from that hold by superior force, or was rescued therefrom by the interference of others, this would be a sufficient retaking by the officer to allow him to return a rescue. The judge declined to so rule, but instructed the jury on this point as stated in the opinion. The jury found for the plaintiff. Other facts appear from the opinion.

*D. S. Richardson and S. A. Brown*, for the defendant.

*T. H. Sweetser and A. F. L. Norris*, for the plaintiff.

By Court, METCALF, J. 1. When this case was formerly before the court (1 Allen, 350), we decided that the averment in the declaration, that the writ against Stoddard was returnable to the court of common pleas, "as by the record of the same writ, in the same court remaining, more fully appears," was supported by proof that the writ was returned to the clerk's office and placed in the files of non-entries. So the reporter understood and stated the decision, as he was authorized by the fact that the point was argued, with other points, and that the court granted a new trial, "upon a single ground," namely, an erroneously instruction given to the jury as to the defendant's liability for an escape; thereby, by necessary implication, overruling the exception which is now brought again before the court. A writ, when returned, is matter of record: 1 Stark. Ev., 4th Am. ed., 285; Powell on Evidence, 293; 1 Greenl. Ev., sec. 521.

2. It is not a matter of right that depositions used in the trial of a cause shall be delivered to the jury, on their retiring to consider of their verdict. It is matter of discretion, the exercise of which by a judge is not a legal ground of exception. See Graham & Waterman on New Trials, 80; *Spence v. Spence*, 4 Watts, 168; *Alexander v. Jameson*, 5 Binn. 238.

3. We are of opinion that the judge correctly ruled that the return of Thomas, on the writ against Stoddard, was not conclusive in this action against the defendant for an escape. The defendant relies on the position, often found in the books, that an officer's return cannot be contradicted by parties and

privies, except in an action against him for a false return. But we cannot see, on principle, any more reason why his return should be conclusive in this action for an escape — which assumes that the return was false — than in an action directly charging him with a false return. If his return be true, he may prove it to be so, as well in this action as in the other. His return is *prima facie* evidence of a rescue, and the burden is on the plaintiff to prove it false, as well in this action as in the other. And not one of the numerous books cited by the defendant's counsel, nor any case in any English book, shows that an officer's return of a rescue has ever been decided to be conclusive evidence in his favor in an action brought against him for an escape. On the contrary, there are recent English authorities which show that it is not conclusive. It was so decided by Holroyd, J., in *Adey v. Bridges*, 2 Stark. 189. In *Jackson v. Hill*, 10 Ad. & E. 492, Patteson, J., denied that a return was conclusive in all cases except in an action for a false return, and said: "The case cited from the Year-book [5 Edw. IV. 1] is strong to show that a return is conclusive only in the particular cause in which it is made; and there is no authority the other way." See also Vin. Abr., tit. Return, O, 25; 1 Saund. Pl. & Ev., 2d ed., 1074; Atkinson's Sheriff Law, 247, 248; Watson's Sheriff, 72; 3 Phil. Ev., 4th Am. ed., 701; 1 Taylor on Evidence, 702, 703.

If there are any decisions in this country which support the defendant's exception to the ruling on this point we cannot follow them. We adopt the views of the supreme court of Vermont in the case of *Barrett v. Copeland*, 18 Vt. 67 [44 Am. Dec. 362], which cannot be distinguished, in principle, from the case before us. That was an action for an assault and battery and false imprisonment at B. The defendant pleaded, in justification, that he was a constable of the town of M.; that he arrested the plaintiff at M. on an execution; that the plaintiff escaped, and that he pursued and recaptured him in the town of B. and conveyed him to M. on the way to prison. On the trial in the county court, the defendant gave in evidence the execution and his return thereon, in which he set forth an arrest of the plaintiff at M. as averred in the plea. The plaintiff offered evidence to contradict the return, but it was excluded, and the defendant obtained a verdict on which judgment was rendered. The supreme court reversed that judgment. "The question," said Royce, J., "now presented is, whether the official return of a public officer is conclusive

evidence in favor of such officer, in the prosecution or defense of a collateral action. We find it laid down as undoubted law that such a return is admissible evidence in the officer's favor; as also to affect the rights of third persons. But these authorities uniformly assert that when offered for such a purpose it is but *prima facie* evidence. Its admissibility is put upon the ground of the general credit due to the return of such an officer in cases where it is his duty to make a return. But upon principle, it should be subject to contradiction by third persons, because they are neither parties nor privies to the transaction, and because they would not, according to any precedent with which I am acquainted, be entitled to a remedy against the officer for a false return. It should also be open to contradiction collaterally, even by a party to the process. We are therefore of opinion that the plaintiff was entitled to go into evidence to disprove the alleged arrest at M. And for the rejection of the evidence offered for that purpose, the judgment of the county court must be reversed": See also *Francis v. Wood*, 28 Me. 69.

4. But we are of opinion that the jury were wrongly instructed; that they were to determine whether Thomas ought not, under the particular circumstances of the case, to have called for aid in arresting Stoddard; and whether, if he had done so, he would not have secured him; and whether his omission to call for aid showed negligence on his part. Though an officer has authority, yet he is not bound to call for aid in the service of mesne process, and is not liable for an escape that might have been prevented by his calling for aid, if the party arrested by him rescues himself, or is rescued by others: *May v. Proby*, 3 Bulst. 200; S. C., 1 Rol. 388; Id. 440; and Cro. Jac. 419; *Watson's Sheriff*, 60; *Griffin v. Brown*, 2 Pick. 304, 310; *Buckminister v. Applebee*, 8 N. H. 547; *Sutton v. Allison*, 2 Jones, 341.

5. We are of opinion that as to all things except the duty of Thomas to call for aid in the service of the process in his hands, the jury were rightly instructed that it was for them to decide whether Thomas used all reasonable and proper exertions to secure Stoddard, and that this question was not to be decided by the opinion and judgment of Thomas at the time. But for the reason already given, the instruction was erroneous, so far as it left the jury at liberty to decide whether Thomas, by not calling for aid, omitted a necessary and proper exertion to secure Stoddard.



6. We are also of opinion that the jury were wrongly instructed that to enable the defendant to set up a rearrest of the debtor (Stoddard) by the officer (Thomas), the hold of the debtor by the officer would not be sufficient, unless the debtor was held and stopped, or the officer had such a hold of him that it was in his power to stop him.

There cannot be either an escape or a rescue of a person unless he is first arrested. If an arrest is prevented by a party's avoidance or resistance of an officer, or by the interference of others, the party does not escape, and the officer is not liable in an action for an escape; but is liable, if at all, in an action for negligence in not making an arrest when he might and ought. And the law is the same in regard to a rescue. An officer cannot legally return a rescue of a party whom he had not arrested. Such a return would be false. We have, therefore, in deciding on this last instruction given to the jury, to consider the question, What constitutes an arrest? And our opinion is, that an officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him: 1 Hale P. C. 459; *Genner v. Sparkes*, 1 Salk. 79; S. C., 6 Mod. 173; *Sheriff of Hampshire v. Godfrey*, 7 Mod., Leach's ed., 289; *Williams v. Jones*, Rep. temp. Hardw. 801; Bul. N. P. 62; Watson's Sheriff, 90; *United States v. Benner*, Bald. 239. And we need not express an opinion as to what else will or will not amount to an arrest. We think that the instruction, prayed for on this point by the defendant, should have been granted, and that the exception taken to the instruction that was given must be sustained.

New trial granted.

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SHERIFF'S RETURN, WHEN CONCLUSIVE AND WHEN NOT: See *Marvel v. Manouvrier*, 74 Am. Dec. 424, note 427, where other cases are collected; *Tillman v. Davis*, 73 Id. 786, note 789. The return of an officer upon his precept is conclusive evidence in the suit or proceeding in which it is made, but is not conclusive in a suit upon a collateral matter in which the officer is a party, and relies upon it to prove his case. The truth of the return is then in issue, and the return is only *prima facie* evidence: *McGough v. Wellington*, 6 Allen, 507, citing the principal case.

DEPOSITIONS SHOULD NOT BE PERMITTED TO GO TO JURY, where parts of them have been underscored by the party offering them for the purpose of attracting the attention of the jury: *Knight v. Coleman*, 49 Am. Dec. 147. Depositions sent to the jury, which contain improper matter, will vitiate the verdict, unless the same are wholly immaterial, or were sent through mistake: *Kittredge v. Elliott*, 41 Id. 717. It is not a matter of right that depositions used in the trial of a cause shall be delivered to the jury on their retiring

to consider of their verdict. It is matter of discretion, the exercise of which by a judge is not a legal ground of exception: *Nichols v. State*, 65 Ind. 519, citing the principal case.

**ARREST, WHAT IS:** See *Haskins v. Young*, 31 Am. Dec. 426, note 428; *Bissell v. Gold*, 19 Id. 480, note 485, where this subject is discussed at length.

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## EASTMAN v. SANBORN.

[8 ALLEN, 594.]

**HIRER OF HORSE, WHO, BY IMPROPER FEEDING AND WATERING, MAKES HIM SICK,** and returns him in that condition to his owner, is liable for his full value, if the owner, by the use of reasonable care and the employment of a suitable veterinary surgeon, who treated him according to his best judgment, was unable to cure him, although the treatment was in fact improper, and contributed to the horse's death.

**TORT** to recover the value of a horse hired by the defendant, which, soon after his return to the plaintiff, sickened and died. The facts are stated in the opinion.

*D. S. Richardson and T. Pearson*, for the plaintiff.

*T. H. Sweetser and W. P. Webster*, for the defendant.

By Court, MERRICK, J. It appears from the report that evidence was first introduced upon the trial by the plaintiff tending to show that the death of the horse was occasioned by his being overfed and improperly watered by the defendant; and that the latter thereupon produced evidence tending to show that the medicines administered by the veterinary surgeon who was called in to take care of the horse upon his return to the stable, were injurious, and contributed to his death. There was further evidence produced by the parties upon each of these questions, but it was conflicting and inconclusive; and upon the whole of it being submitted to the jury, the presiding judge was requested by the plaintiff to instruct them that if the defendant, by improper treatment of the horse caused him to be sick, and returned him in that condition to the plaintiff, who thereupon employed suitable persons to take care of him, and they did take care of him, according to their best judgment, the defendant was liable for the value of the horse, although such subsequent treatment contributed to his death. But this request was not sustained, and the jury were instructed that, if the death was in part occasioned by such subsequent treatment, the defendant was not responsible, and that this action could not be maintained.

In each of these particulars, the rulings upon which the instructions given to the jury were predicated, were erroneous. The hirer of a horse for any specified time, journey, or service, like any other bailee, is bound to exercise ordinary diligence in the use and care of the property lent to him, and is responsible for all the injurious consequences resulting from a culpable neglect to do so: Story on Bailments, sec. 399; *Bray v. Mayne*, Gow, 1. The death of a horse must be considered as one of the direct consequences of ill treatment by such culpable neglect, if, being made sick by it, he dies immediately afterwards, notwithstanding reasonable care is in the mean time exerted, and reasonable means are resorted to and applied for his preservation and cure. The owner, upon the return of an animal to him under such circumstances, is undoubtedly bound to use such care and make such efforts; and if he fails to do so, all consequent loss by death, or otherwise, must fall upon him. In the case of *Dean v. Keate*, 3 Camp. 4, it was held by Lord Ellenborough that the hirer is not responsible for any mistakes which a farrier, whom he calls in to attend to a hired horse, sick at the commencement, or made so without his fault in the progress of the journey, may commit in the treatment. And this, upon the principle that as he is bound to use due care, and having in this respect discharged his whole duty by employing a suitable person to render assistance in the exigency which had arisen, he is in no fault, and ought not, therefore, to be held liable for any resulting consequence. In such case, the loss must fall upon the owner. The application of the same principle to the converse proposition makes the hirer liable for the entire ultimate loss, where, having first by his inattention and carelessness injured the property, and afterwards returned it in a damaged condition to the owner, the latter is unable, by the exercise of reasonable care, either to preserve or to derive any benefit or advantage from it. All that can be required of the lender whose property is injured by the culpable neglect or misconduct of the borrower is, that he shall use all reasonable means in his power to avert the consequences, or to diminish the effect of the injury as far as he can. Where this is done, the person by whom the wrong is committed must be responsible for all the damage which ensues from it. Thus in the case of *Tuttle v. Holyoke*, 6 Gray, 447, it appearing that the plaintiff's horse was thrown, by reason of a defect in the highway, on to and across a rail-fence standing by the side of the road, and was

removed therefrom by being rolled over the fence, by four or five men, into the adjoining lot, and that his leg was broken, the defendants contended that they were not liable, if the leg was broken by the fall when the horse was so-rolled over; but it was determined that they were liable for the value of the horse, even if the disaster occurred in that manner, if the persons who attempted to extricate him from the perilous position upon the fence into which he had been thrown did in all respects use reasonable care in their efforts to afford him relief. And in *Ingalls v. Bills*, 9 Met. 1 [43 Am. Dec. 346], it was to the same effect held that the proprietors of a stage coach were amenable in damages to a passenger who, by reason of a defect in the construction of their carriage, for which they were responsible, was placed in such a situation of peril as to make it a reasonable precaution on his part to leap from the carriage, and who by so leaping sustained a serious injury, although he would have been perfectly safe if he had remained quietly in his seat: See *Commonwealth v. Hackett*, 2 Allen, 136.

Thus, in the present case, where the horse hired by the defendant, having been made sick and diseased by his carelessness and inattention, was returned to the plaintiff, it became his duty to take reasonable care of the horse, and to use ordinary diligence in seeking for and applying proper remedies for his restoration. This was all that the law required of him, because it was all that he could in fact do. There are no known means which can be resorted to with any absolute certainty that they will prove sufficient to eradicate disease, and bring back health, or prolong the existence of animal life. Notwithstanding the utmost efforts of persons the most proper to be called on to render assistance in such exigencies, and most competent to afford it, fatal results may follow from their action or prescription, because there is no possibility of guarding effectually against injurious consequences, which are the result of mere errors of opinion or mistakes in judgment. And therefore, if the plaintiff did, on the return of the horse, employ suitable persons to take care of him, and they were faithful in the performance of the service in which they were employed, and the horse died, notwithstanding their efforts to save and restore him, the death must be attributed to the disease caused by the culpable neglect of the defendant, even though the remedies applied in the course of the treatment, instead of having their intended effect, aggravated the disease, and contributed in some degree to its fatal termination.

From these considerations it is apparent that, upon the facts assumed in the hypothesis upon which the instructions here asked for by the plaintiff were predicated, the defendant is liable for the full value of the horse, and that damages to that extent may be recovered of him in this action. The declaration alleges that he carelessly, negligently, and improperly overfed and watered the horse, by means whereof he died. When it has first been shown that the alleged carelessness and negligence caused the horse to be sick and diseased, the further averment that his death was occasioned by the same means will be established by proof that he died of such disease, if due care and diligence to heal and restore him to health were used by the plaintiff, although the means resorted to for such purpose unfortunately and accidentally contributed in part to the fatal result. It is obvious, therefore, that the instructions to the jury were erroneous, and that the exceptions taken by the plaintiff must be sustained.

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LIABILITY OF BAILER FOR MISUSER OF BAILED PROPERTY: See *Hart v. Skinner*, 42 Am. Dec. 500, note 504, where other cases are collected.

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## CHILD v. CITY OF BOSTON.

[4 ALLEN, 41.]

CONTROL OF CONSTRUCTION OF COMMON SEWERS IN CITY OF BOSTON is vested exclusively in the board of aldermen, and the city is not liable for any injury or inconvenience occasioned to private persons by the location or construction of such sewers according to the order of that board.

CARE AND MAINTENANCE OF COMMON SEWERS, WHEN BUILT, DEVOLVE WHOLLY UPON CITY, and it is bound to provide for keeping them in order through such agents and officers as it may choose to select and appoint; and the city is liable for negligently permitting them to occasion a nuisance to the property of citizens whose private drains connect with them, if such nuisance does not result from their original plan of construction, and might have been avoided by keeping them in proper condition.

COMMON SEWER, WHEN BUILT, BECOMES PROPERTY OF CITY, and no private person has any power to interfere with it.

WHERE SEWER IS ORDERED TO BE CONSTRUCTED WITH WASTE WEIR discharging into the empty basin of a certain bay, and it is built according to this order, it becomes the duty of the city, when the flats between the upland and the channel of such basin are filled up and made solid land, to extend such sewer through the land so made, so as to keep open a place of discharge into the basin, the city having the right thus to extend it; and if, through its failure to do this, injury is occasioned to the private property of a person by the overflow of the sewer, the city will be liable in damages.

INDENTURE GRANTING TO CITY OF BOSTON "RIGHT TO DIG, LAY, AND MAINTAIN all convenient and necessary sewers or drains from the upland to the channel or deep water within the basin, according to law and the common and usual practice for the time being within the city," must be construed to apply, not only to the wants of the city as a private owner of lands in the neighborhood, but also to the sewers for general use, which it might be its duty, in its municipal capacity, to construct and maintain.

TORT to recover damages sustained by reason of flooding the basement of the plaintiff's house with drain water. The plaintiff owned a house and lot in Dover Street in Boston, which he held through mesne conveyances from Edward Tuckerman, the lot being a parcel of the land described in the tripartite indenture referred to in the opinion as belonging to said Tuckerman. This land was formerly drained into the empty basin in the Back Bay, through a sewer built jointly by the city of Boston and Tuckerman. In the year 1850 or 1851, the city built a common sewer in Tremont Street, extending both northerly and southerly from Dover Street, and also a common sewer connected with the one above mentioned, and running through Dover Street to the South Bay, which sewer cut off the former drain of the plaintiff. Ordinarily, the only outlet to the sewer in Dover Street was into the South Bay, and at the depth of some feet below high water; but a waste weir was put into the sewer in Tremont Street, which opened into the empty basin in the Back Bay, and through which the water in the sewer would discharge into the empty basin, when the outlet into the South Bay was closed by the tide and the water in the sewer had risen high enough to reach the waste weir. When this sewer was built, the plaintiff's drain was connected with it by the city. Some time subsequently to the building of the sewers in Tremont and Dover streets, the house of the plaintiff which had previously been perfectly drained, was flooded in the lower story with drain water, and continued to be so flooded, at different periods of the year, ever since, and this fact was repeatedly made known to the officers of the city. The defendant admitted that the waste weir into the Back Bay was closed up by the Boston Water Power Company at some period before the action was brought, by filling in against the sewer, and that part of the damage done to the plaintiff was thus occasioned. The plaintiff waived any claim for damage from any other cause. The jury found for the plaintiff. The other facts are stated in the opinion.

*J. G. Abbott and J. P. Healy*, for the defendant.

*P. W. Chandler and G. O. Shattuck*, for the plaintiff.

By Court, HOAR, J. This case has been three times argued, and has received from the court that full consideration to which it is entitled, not only from the large interests involved, but from the intrinsic difficulty of the questions which it presents.

The common sewer into which the plaintiff's drain entered, and from which the water was set back upon his land, was constructed by the city of Boston under an order of the mayor and aldermen, passed on the 8th of July, 1850. The right and duty to make, maintain, and repair common sewers were given by statute of 1841, c. 115; and the sixth section of the act provided that it should not take effect in any city until it should have been accepted by the mayor and aldermen and common council thereof. The act was accepted by the city council of Boston, April 5, 1841.

The order of the mayor and aldermen required that the sewer should be constructed in conformity with a plan of drainage for the southwestern portion of the city, reported in City Document No. 14, of the year 1850, by Messrs. Chesbrough and Parrott; and it appears from that report that the drainage of that locality presented peculiar difficulties. The grade of Dover Street, upon which the plaintiff's house stood, was below the level of the sea at high water; and any drainage from it into the sea was therefore impossible, except at low stages of the tide. The plan adopted was to furnish the outlet of the sewer with a flap or gate, which would open to allow the discharge of water at low tide, but which the rising tide would close, and thus prevent the reflux of the salt water. And it was supposed that the capacity of the lower part of the sewer near the outlet would be sufficient to contain all that would be required to pass into it from private drains and from the street gutters, under ordinary circumstances, until the ebb of the tide would allow its discharge into the sea. But whenever heavy rains or melting snows should suddenly increase very much the quantity of water flowing into the sewer at a stage of the tide when the outlet was closed by the gate, it was obviously necessary to take some other measures to prevent the overflow from the sewer through the private drains into the houses, cellars, and yards of the abutters upon the street. With this view, the report of Messrs. Chesbrough and Parrott



contained a suggestion to the following effect: "In order to guard the basements and back-yards of these houses from inundation by heavy rains during high tides, it will be necessary to have one or more waste weirs, discharging from the main on Tremont Street into the empty basin, and placed at such a level as to act only when the sewers are filled to overflowing, either from heavy rains or from the flaps getting out of order and letting in the tide. Should the empty basin ever become covered with houses and streets, this plan of wasting surplus water into it could not be continued. In that case we see no practical remedy except pumping for preventing the inundation of the basements and back-yards of houses in the lowest parts of the district, should heavy rains occur during high tide; unless, indeed, the streets are raised high enough above the tide to turn the water in that direction, either by surface or underground drainage."

This was the particular method proposed, and it was in conformity with the fifth recommendation of the report, "for affording a permanent and safe system of drainage," which was as follows: "That the low portions of the district which are already improved be protected, as far as possible, from inundation, by such temporary expedients as are practicable, until a judicious plan of raising them to the height proposed can be adopted and carried out."

The commissioners in another part of their report expressly state that they "are not prepared to recommend a resort to pumping"; and the result of the whole scheme was therefore this: to adopt the plan of a waste weir into the empty basin as a temporary expedient, so long as drainage in that direction should continue practicable; and as a last resource, to require a raising of the grade of the street and of the lands adjoining to such an extent as to admit a more perfect drainage by discharge into the sea.

The jury were instructed at the trial that the city had the right, under the tripartite indenture between the city of Boston, Edward Tuckerman, and others, and the Boston and Roxbury Mill Corporation, to maintain the waste weir, and drain through it into the empty basin; and we think this instruction was correct. The language of that instrument conferred a very broad and comprehensive right, under a covenant, in these terms: "The said Boston and Roxbury Mill Corporation does hereby covenant, grant, and agree that the said parties of the first and second part, their respective successors,

heirs, and assigns, shall have and enjoy forever the right to dig, lay, and maintain all convenient and necessary sewers or drains from the upland to the channel or deep water within the basin, according to law and the common and usual practice for the time being within the city." This was clearly intended and must be construed to apply, not only to the wants of the city as a private owner of lands in the neighborhood, but also to the sewers for general use which it might be their duty, in their municipal capacity, to construct and maintain.

The report of Messrs. Chesbrough and Parrott contained a plan of the sewers which they recommended, and a full specification of the kind and amount of materials necessary to their construction; and the sewer in Dover Street was completed in precise conformity therewith. No defect or want of repair in the sewer itself has been discovered since it was completed; but the obstruction which caused the injury of which the plaintiff complains, was occasioned by the filling up of the flats owned by the Boston Water Power Company between the mouth of the waste weir and the channel of the empty basin, and the failure to extend the sewer through the solid land thus created.

The question whether the defendants are liable at all for the condition of the sewer, and if so, upon what grounds, is one certainly not free from difficulty. It was built, not by their direction as a municipal corporation, but by the order of the mayor and aldermen, who act upon many subjects as an independent board of public officers, intrusted with a large discretion, and appointed by law to exercise an absolute and exclusive control upon matters within their jurisdiction. The statute provides that the mayor and aldermen may lay, make, maintain, and repair all main drains or common sewers in the city. The city ordinance requires all particular drains which enter a common sewer, to be laid under the direction of the board of aldermen, and to be built of such materials as they shall direct. All the main drains and common sewers are made the property of the city or town in which they are built, and the cost of their construction and repair is to be assessed upon the owners of lands benefited by them, except such proportion as by by-law, ordinance, or otherwise may be required to be paid by the city or town, which in Boston is to be not less than one quarter part.

Upon mature deliberation, we are all of opinion that the defendants are not responsible for any defect or want of effi-

ciency in the plan of drainage adopted, although it might expose the plaintiff to incidental inconvenience. If the plaintiff chose to build his house below the level of the sea at high water, it was manifestly impossible that the discharge of drains into the sea should be at all times perfect and unobstructed. The duties of the aldermen in determining what drains should be built, and where they should discharge, were of a *quasi* judicial nature, involving the exercise of a large discretion, and depending upon considerations affecting the public health and general convenience. They were required to act, not as agents of the city, or in any manner under the direction of the city, but as public officers. If, in the exercise of their judgment, it appeared to them best that the sewer should be built wholly above the level of tide-water, the private drains which were required to enter into it must of course be placed at a corresponding elevation; and it would follow as a necessary consequence that the grade of the cellars and yards adjacent must be raised to the like extent, or that drainage could only be allowed from the upper part of the houses.

But after a common sewer is built, and until some change in its location or construction is directed by the board of aldermen, its care and maintenance devolve wholly upon the city, who provide for keeping it in order through such agents and officers as they choose to select and appoint. The superintendent of common sewers, the officer designated for this purpose in the city of Boston, is chosen by the concurrent vote of the two branches of the city council, is removable at their pleasure, and receives such compensation as they determine: City Ordinances of Boston, ed. of 1856, 487. The sewer is the property of the city, and no private person has any power to interfere with it. The abutters pay such sums as are assessed upon them for its construction, and the benefit which they receive from it is the only return for this contribution. The charge of sewers and drains is not an obligation imposed upon the city by legislative authority, exclusively for public purposes, and without its corporate assent. It was voluntarily assumed by the acceptance of the act conferring the power.

These circumstances seem to the court to distinguish this case from the class of cases in which it has been held that a private action cannot be maintained against a city or town, unless such an action is expressly given by statute, for negligence in the discharge of a public duty, the performance of which is required of all such corporations alike: *Mower v.*

*Leicester*, 9 Mass. 247 [6 Am. Dec. 63]; *Bigelow v. Randolph*, 14 Gray, 541. Here a special authority was conferred and accepted, involving important relations to individual proprietors of land, and entire control of an easement of such a nature that negligence might not only deprive those interested of a benefit which it was designed to afford, and for which they had paid, but produce consequences actively and directly pernicious. The duty to keep the sewer free from obstructions was a ministerial duty, and the defendants were liable for negligence in its exercise to any person to whom their negligence occasioned an injury: *Mayor etc. of New York v. Furze*, 8 Hill, 616; *Wilson v. Mayor etc. of New York*, 1 Denio, 595 [43 Am. Dec. 719]; *Eastman v. Meredith*, 36 N. H. 284 [72 Am. Dec. 302], and cases there cited.

This brings us to the last question for decision, which is, perhaps, the most doubtful which the case presents. The injury to the plaintiff was caused, not by any defect in the sewer as originally built, nor by any want of repair; but by an obstruction at the mouth of the waste weir, filling up the place of discharge, and thus effectually closing the orifice through which, in times of freshet, the surplus water was designed to flow. It is argued for the defendants that this does not come within the just limits of their responsibility; that if they built the sewer in conformity with the order of the board of aldermen, kept it in repair and free from internal obstruction, they could not be answerable for the filling up, by another party, of the part of the basin where the sewer emptied; and that what was needed to remedy the difficulty was in fact an extension of the sewer, which they could not be required to undertake until the board of aldermen had made an adjudication upon its necessity, and directed it to be built. It was in reference to this position, which is certainly plausible, that the last reargument of the case was ordered. But upon examination, we do not think it can be supported.

In determining what it was incumbent on the city to do, in the construction and maintenance of the sewer, regard must be had to all the circumstances existing at the time when the order was passed under which it was built. The city knew that the Boston Water Power Company owned some flats between Tremont Street and the channel of the empty basin, and that they were likely to fill them up. This appears from the report of the committee of the aldermen, in pursuance of which the order to build the sewer was adopted. That com-

mittee say: "At this very moment, some of the principal sewers in the vicinity of Dover Street are obstructed by the earth which has been thrown into the empty basin, under the direction of the Water Power Company, on the westerly side of the Tremont Road, in order to bring their property into use, and their contents are fast creating a grievous nuisance by permeating through it." This was one of the chief evils which the plan of drainage recommended was intended to obviate. The committee further say that the sewers which they propose "will be self-acting, effective, and undoubtedly sufficient for the entire house and surface drainage. Whatever inconveniences might be apprehended from the sudden flowing in of back-water have been provided for by flaps at the outlets, and a waste weir on the empty basin." It is obvious from these statements that the plan contemplated an effective discharge from the waste weir into the channel or deep water of the empty basin; to be carried through any intervening obstruction, and only to cease or to require a new provision or adjudication of the board of aldermen, when the territory of the basin should be substantially covered with houses and streets. It is true that the report of the engineers contained an estimate of the materials necessary to complete the sewer; and that the committee of the board of mayor and aldermen, in November, 1850, reported that it was completed: City Document, 1850, No. 34. But with the liability to have the flats filled up at the outlet, and the right of the city to extend its drains through them, when thus filled, we think the original order of the mayor and aldermen to construct the sewer upon the plan proposed must be construed as requiring it to be made continuously effective for the discharge of water into the basin; and that if not extended at first as far as the Water Power Company had a right to fill, that was to be regarded as a temporary omission, for the sake of present economy, but which left the obligation upon the city, as the owner of the sewer, and charged with its maintenance, to keep it in operation and open to the edge of the upland, as the gradual changes in the shore might from time to time require. This being comprehended in the order first passed, no new order or direction was necessary to give it binding force.

As the instructions given to the jury at the trial were correct, the plaintiff is entitled to judgment. It will be sufficiently apparent from the observations already made, that the court do not intend to intimate that if the board of alder-

men had passed an order directing the waste weir to be closed, the defendants would have incurred any liability, or would have been bound to compensate the abutters upon Dover Street for the expense of raising the grade of their cellars and yards, which such a change in the system of drainage might render indispensable. But while that system remained unchanged, we are of opinion that they were liable for damages occasioned by negligence such as the present action discloses.

Judgment for the plaintiff on the verdict.

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MUNICIPAL CORPORATIONS, LIABILITY OF, IN RESPECT TO SEWERS: See *City Council v. Gilmer*, 70 Am. Dec. 562, note 570; *Perry v. City of Worcester*, 66 Id. 431, note 434, where this subject is discussed. The board of aldermen, in laying out and constructing drains and sewers, act as public officers, and not as agents of the city: *Griggs v. Foote*, 4 Allen, 197; *Bedford v. Inhabitants of Taunton*, 9 Id. 209; *Wheeler v. City of Worcester*, 92 Mass. 604; *Barney v. City of Lowell*, 98 Id. 571; *Haskell v. New Bedford*, 106 Id. 211, all citing the principal case. A board of aldermen and common council, in laying out and constructing ways, are not subject to the direction or control of the inhabitants of the city, but are an independent board of public officers, vested by law with the control of all matters within their jurisdiction, and performing duties imposed by general laws: *Brimmer v. Boston*, 102 Id. 22, citing the principal case. The authority conferred upon municipal corporations or officers to determine where drains shall be built is in the nature of a judicial power, involving the exercise of a large discretion, and depending upon considerations affecting the public health and general convenience; and therefore no action lies for a defect or want of sufficiency in the plan or system of drainage adopted within the authority so conferred: *Emery v. Lowell*, 104 Id. 16; *Hill v. Boston*, 122 Id. 359, both citing the principal case. Where a special charter, accepted by a city or town, or granted at its request, requires it to construct public works, and enables it to assess the expense thereof upon those immediately benefited thereby, or to derive benefit in its own corporate capacity from the use thereof, the city or town is liable as any other corporation would be, for any injury done to any person in the negligent exercise of the powers so conferred: *Oliver v. Worcester*, 102 Id. 500; *Emery v. Lowell*, 104 Id. 15, both citing the principal case. A city has no right to so build or manage common sewers as to create a public nuisance. And if a private nuisance is created, the city will be answerable in damages to the person injured: *Brayton v. Fall River*, 113 Id. 227, citing the principal case. For neglect in keeping common sewers in repair, whereby private property is injured, an action may be maintained against a city: *Hill v. Boston*, 122 Id. 359, 365, citing the principal case. Common sewers are the property of the city, and it is bound to keep them in repair: *Ranlett v. Lowell*, 126 Id. 432, also citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in the following cases: *Barry v. Lowell*, 8 Allen, 128; *Whiting v. Mayor etc. of Boston*, 106 Mass. 93; *Detroit v. Blackeby*, 21 Mich. 108. It is also referred to in *Roll v. City of Indianapolis*, 52 Ind. 560, among many other cases, as throwing some light upon the subject there under consideration.



**MULREY v. SHAWMUT MUTUAL FIRE INSURANCE Co.**

[4 ALLEN, 116.]

**CONDITION IN POLICY OF MUTUAL INSURANCE COMPANY THAT NO INSURANCE SHALL TAKE EFFECT** until the cash premium has been actually paid at the office of the company, and that every insurance agent, or other person forwarding applications or receiving premiums, is the agent of the applicant and not of the company, is not complied with by a payment of the premium to an insurance agent through whom the application is received and the policy delivered. Such condition is a condition precedent to the taking effect of the policy.

**OFFICERS OF MUTUAL INSURANCE COMPANY HAVE NO AUTHORITY TO WAIVE** the by-laws and provisions adopted by the members of the company for their mutual protection.

**CONTRACT** upon a policy of insurance, issued by a mutual fire insurance company, containing the provision mentioned in the opinion. The application was made through one Brown, an insurance agent, through whom several policies had been effected between the defendants and persons seeking insurance, and who received the policy in this case, delivered it to the plaintiff, and received from him the premium; but he did not offer to pay the premium over to the company until after the loss occurred. Brown testified that he was in the habit of settling a monthly account with the insurance offices with which he did such business, and that the defendants, on presenting to him his account, after the loss, did not include the premium received by him from the plaintiff, and he immediately called attention to the fact, and tendered the amount to the defendants at their office, but they refused to receive it. The judge directed a verdict for the defendants. Other facts are stated in the opinion.

*J. M. Keith*, for the plaintiff.

*W. L. Burt*, for the defendants.

By Court, DEWEY, J. This policy failed to become effectual, for the reason that the cash premium had never been actually paid at the office of the company. The payment to Brown was no compliance with this condition of the policy. On the face of the policy, and as a condition thereof, was a provision that no insurance shall take effect until the cash premium has been actually paid at the office of the company, and that every insurance agent, or other person forwarding applications or receiving premiums, is the agent of the applicant, and not of the company. This was a mutual insurance company, and the plaintiff, as a member, would have his interest protected



by such a rule equally with all other members. The company deemed it a proper precaution against the frauds of agents forwarding applications and receiving premiums to make the applicant for insurance responsible for the actual payment of the cash premium at the office of the company. This being a condition precedent to the taking effect of the policy, this objection to the right of the plaintiff to maintain the present action is a fatal one.

There was no waiver of this provision in the policy. The case of *Hale v. Mechanics' Ins. Co.*, 6 Gray, 169 [66 Am. Dec. 410], strongly indicates the views of this court, against the authority of the officers of a mutual insurance company to waive the by-laws and provisions adopted by the members of such company for their mutual protection. See also *Brewer v. Chelsea Ins. Co.*, 14 Id. 203; *Baxter v. Chelsea Ins. Co.*, 1 Allen, 294 [79 Am. Dec. 730]; *Priest v. Citizens' Ins. Co.*, 3 Id. 602. The cases in New York cited by the plaintiff have a contrary bearing.

The case of the plaintiff failing upon the grounds already stated, it is unnecessary to consider the further objections urged on the part of the defendants.

Judgment upon the verdict for the defendants.

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INDIVIDUAL CREDIT OF INSURED MAY BE ACCEPTED AS PAYMENT by the agent of the company: See *Sheldon v. Life Ins. Co.*, 65 Am. Dec. 565, note 571.

STIPULATIONS MAKING AGENT OF INSURER AGENT OF ASSURED: See note to *Clark v. Union M. F. I. Co.*, 77 Am. Dec. 724-728.

OFFICERS OF MUTUAL INSURANCE COMPANIES HAVE NO AUTHORITY TO WAIVE BY-LAWS and provisions adopted by the company for its protection: *Murphy v. People's etc. Ins. Co.*, 7 Allen, 242; *Evans v. Trimountain M. F. I. Co.*, 9 Id. 331, both citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Leonard v. Washburn*, 100 Mass. 254.

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## FEARING v. KIMBALL.

[4 ALLEN, 125.]

PARTY CANNOT BE PERMITTED TO READ IN EVIDENCE UNANSWERED LETTER from himself to the adverse party, for the purpose of proving the truth of facts stated in it, although it was in reply to a letter to himself, which has been put in evidence.

CONTRACT to recover the price of chains and anchors furnished by the plaintiffs to the ship *Yankee Ranger*, in 1854. The defendant Trowbridge was defaulted, and Kimball alone

defended. The plaintiffs contended at the trial that Kimball was a part owner of the ship, and that he had, through an agent, procured the articles, and authorized the plaintiffs to charge them to him as owner. They read to the jury the following letter from them to him, dated February 9, 1860: "You will remember that when we last saw you in Boston you said we should hear from you before the close of the year 1859, in regard to our claim on ship Yankee Ranger, and that you would make us a proposition that would be satisfactory. We have ever since been hoping to hear from you, in accordance with the encouragement you then gave us. Please write on receipt of this, and say what you will do." The following reply to this letter was also read; it was dated February 21, 1860: "Yours of February 9th is at hand, and would have been answered before if I had been at home. When I last saw you, I said I would talk with Mr. Trowbridge, and see what offer he would make. I did talk with him. He said he had nothing, and was sick, and could not pay anything. Since I read your letter, I have talked with him again. He said he cannot raise over two hundred dollars." The plaintiffs were then allowed, under objection, to read the following portion of a letter from them to the defendant, to which no reply was sent; this letter was dated March 15, 1860: "We duly received yours of the 21st of February, and must say that we were surprised at the contents. You say that when you last saw us, you told us you would talk with Mr. Trowbridge, and see what offer he would make, which you did on your return home, and he said he was sick, and had nothing, and that you have again seen him since the receipt of our letter of the 9th ult., and he now says he cannot raise over two hundred dollars, and then you let the whole subject drop. Now, in the interview we had with you, alluded to above, there was not one word said about Mr. Trowbridge, and we were not aware that you intended to see him in regard to the subject of our claim. You told the writer of this that there was one matter which, if it turned favorably, and you thought it would, would enable you to make us a handsome offer for our demand; and you had no doubt it would be one that would prove entirely satisfactory to us. You expected to make the offer before the 1st of November, and at any rate, before the end of the year (1859). The name of Mr. Trowbridge was not mentioned by either of us. We claimed the payment of the debt from you, and expected the offer from you." The jury found for the plaintiffs.

*H. W. Paine and R. D. Smith*, for the defendant.

*H. F. Durant and G. A. Somerby*, for the plaintiffs.

By Court, DEWEY, J. The general rule that a party cannot make evidence for himself by his written communications addressed to the other party, as to the character of dealings between them, or the liability of the party to whom they are addressed, in the absence of any reply assenting to the same, is well settled.

A distinction has sometimes been made where the communication thus offered in evidence was a previous letter of the party offering it, to which the letter of the other party was in reply; but even this has been allowed under the peculiar circumstances of the case, and where such prior letter might be properly referred to for the purpose of explaining or applying the letter of the other party, and not as evidence of any independent fact stated therein. The recent case of *Trischet v. Hamilton Ins. Co.*, 14 Gray, 456, illustrates this, and was thus limited. In the previous case of *Dutton v. Woodman*, 9 Cush. 262 [57 Am. Dec. 46], the introduction of the letter of the party offering it was put wholly upon the ground that it was rendered admissible by the subsequent verbal statements of the other party as to the matter contained in it, and the reason why he did not answer it, and it was held that otherwise it must have been excluded. But omitting to answer a written communication is no evidence of the truth of the facts therein stated; nor is a party, under ordinary circumstances, required to reply to a letter containing false statements of facts: *Commonwealth v. Eastman*, 1 Cush. 189 [48 Am. Dec. 596]. The case of *Fairlie v. Denton*, 3 Car. & P. 103, is to the like effect.

But it was urged on the part of the plaintiff that the later case of *Roe v. Day*, 7 Car. & P. 705, is to the contrary effect. It is so to some extent, certainly; but the case was limited to "an immediate reply," in the ruling of the judge admitting it, it being an answer to the letter of the other party written the day previous. And it will be found that in *Richards v. Frankum*, 9 Id. 221, it was again asserted that letters written by a party are not admissible as evidence in his own favor, except as a notice or demand.

The question is obviously one of practical importance, and rather to be decided upon principle than by reference to the *nisi prius* rulings in the cases referred to.

The first letter unanswered would seem to be obviously incompetent evidence to prove the facts therein stated to be true, against the party to whom it was addressed. Why does not the like objection apply to a second letter, reaffirming facts or stating additional ones, and to which there has been no reply? A party may introduce the letter of his adversary, and if need be, for the purpose of enabling the jury to understand fully the letter thus introduced, he may read to the jury the letter to which it was in answer; but to go further, and hold that a second letter of the party, or a third, or fourth, as the case may be, is competent evidence, would be in violation of the rule that a party cannot make evidence for himself by his own declarations, and the further rule that the omission to answer letters written to a party by a third person does not show an acquiescence in the facts there stated, as might be authorized to be inferred in the case of silence, where verbal statements were made directly to him.

In looking at the facts, as presented in reference to the course of the trial here, it appears that the plaintiff was allowed to introduce a letter of the defendant, written to him under date of February 21, 1860, and also his own letter to the defendant, to which the letter of the defendant was in answer. But he was further allowed to introduce a subsequent letter of his own to the defendant, dated March 19, 1860, a period of nearly four weeks after the date of the defendant's letter. This was not "an immediate reply," or necessarily connected with the previous correspondence, so as to require its admission. In the opinion of the court, this letter should have been excluded, and that portion of the same that was allowed to be offered in evidence was erroneously admitted.

Exceptions sustained.

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OMISSION TO ANSWER LETTER ADDRESSED TO PARTY DOES NOT MAKE SUCH LETTER ADMISSIBLE in evidence against him: *Dutton v. Woodman*, 57 Am. Dec. 46, note 50; *Commonwealth v. Eastman*, 48 Id. 596, note 609, where other cases are collected. An unanswered letter is not admissible in evidence, although the statements contained in it are well known to the party to whom it is sent: *Commonwealth v. Edgerly*, 10 Allen, 187, citing the principal case.

## BRACKETT v. LUBKE.

[4 ALLEN, 138.]

**EMPLOYER IS LIABLE FOR PERSONAL INJURIES SUSTAINED BY REASON OF CARELESSNESS OF HIS EMPLOYEE** who is engaged in work done under a general employment for a reasonable compensation or for a stipulated price, when the employer retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient.

TORT to recover damages for a personal injury sustained by the plaintiff, by the falling upon her head of an iron rod which was part of a frame supporting an awning in front of a store occupied by the defendants. The defendants admitted that they were the lessees of the building to which the frame of the awning was attached, and that they were in possession of the frame. The frame belonged to the owner of the building. The defendants obtained from the owner permission to have one end of the frame moved along six or eight inches. They engaged a carpenter to do the work, and having told him what they wished to have done, they gave him no further directions, and were not present when the work was done. The question of the carpenter's negligence was left to the jury, and they rendered a verdict for the plaintiff. Other facts are stated in the opinion.

*J. C. Park*, for the defendants.

*D. Thaxter and W. Warren, Jr.*, for the plaintiff.

By Court, BIGELOW, C. J. This seems to us to be a very clear case. The defendants are liable, because it appears that the negligent act which caused the injury was done by a person who sustained towards them the relation of servant. There was no contract to do a certain specified job or piece of work in a particular way for a stipulated sum. It is the ordinary case where a person was employed to perform a service for a reasonable compensation. The defendants retained the power of controlling the work. They might have directed both the time and manner of doing it. If it was unsafe to make the repairs or alterations at an hour when the street was frequented by passers, it was competent for the defendants to require the person employed to desist from work until this danger ceased or was diminished. If the means adopted to gain access to the awning were unsuitable, the defendants might have directed that another mode should be used. In short, if the work was in any respect conducted in a careless

or negligent manner, the defendants had full power to change the manner of doing it, or to stop it, and to discharge the person employed from their service. The mere fact that the work was done by one who carried on a separate and independent employment does not absolve the defendants from liability. If such were the rule, a party would be exempt from responsibility even for the negligent acts of his domestic servants, such as his cook, coachman, or gardener. This point was distinctly adjudicated in *Sadler v. Henlock*, 4 El. & B. 570. The distinction on which all the cases turn is this: if the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer by which he has agreed to do the work on certain specified terms, in a particular manner and for a stipulated price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer, and given to the contractor. But on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient. This distinction is recognized in the cases adjudged by this court: *Sproul v. Hemmingway*, 14 Pick. 1 [25 Am. Dec. 350]; *Stone v. Codman*, 15 Pick. 299; *Hilliard v. Richardson*, 3 Gray, 349 [63 Am. Dec. 743]; *Linton v. Smith*, 8 Id. 147. In the very recent case of *Pickard v. Smith*, decided in the court of common bench in England, and reported in 4 L. T., N. S., 470, it was held that a lessee and occupier of a refreshment-room at a railroad station, and of a cellar underneath, who employed a dealer in coal to put coal into the cellar, was liable for damages to a person in consequence of his falling through a trap-door which was left open by the servants of the dealer in coal. The court in that case go so far as to say that a person may be held liable if the act which causes the injury is one which he employed another to do, or if it is one which it was incumbent on him to perform as a duty, and which he intrusted to another to do in his stead.

In the case at bar, the defendants were bound to see that, in removing and altering a portion of the awning over the street, no injury should be occasioned to travelers. They can-

not escape this duty merely by showing that they employed a person to change its position or structure, by whose negligent act the injury of which the plaintiff complains was inflicted.

Exceptions overruled.

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**LIABILITY OF EMPLOYER FOR NEGLIGENCE OF EMPLOYEE:** See *Clark v. Fry*, 73 Am. Dec. 590, note 599; *Corbin v. American Mills*, 71 Id. 63, note 65, where other cases are collected. Where the person through whose negligence the injury happened was not in the employment or service of the defendant, but was exercising an independent employment in no way subject to the command or control of the defendant as to the mode in which it should be carried on, the plaintiff cannot recover: *Wood v. Cobb*, 13 Allen, 59; *Ryan v. Curran*, 64 Ind. 354; *City of Logansport v. Dick*, 70 Id. 78, all citing the principal case. Where work is done under a contract, the doctrine of *respondet superior* does not apply: *Wendell v. Pratt*, 12 Allen, 470, citing the principal case. But where an employer retains the right and power to control the time and manner of executing the work, or to refrain from doing it, he is liable for injury sustained by his employee's negligence in performing the work: *Connors v. Hennessey*, 112 Mass. 98, citing the principal case.

**CRITERION BY WHICH TO DETERMINE WHETHER RELATION OF MASTER AND SERVANT EXISTS:** See *Corbin v. American Mills*, 71 Am. Dec. 63, note 65, where other cases are collected. The question whether the relation be that of master and servant or not is to be determined mainly by ascertaining from the contract of employment whether the employer retains the power of directing and controlling the work, or has given it to the contractor: *Forsyth v. Hooper*, 11 Allen, 422, citing the principal case.

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## VOSE v. SINGER.

[4 ALLEN, 227.]

**ONE JOINT OWNER OF PATENT RIGHT CANNOT MAINTAIN BILL IN EQUITY** against another joint owner to compel an accounting for a portion of the profits of sales of the patented article, in the absence of any special agreement.

**CONTRACT**, with a prayer for relief in equity, and that the defendants might be decreed to account with the plaintiffs, and to pay over to them such sums as might be found to be justly due. The following facts were agreed: On the 29th of March, 1852, the defendants, who were the owners of the patent right referred to, executed to the plaintiffs jointly with William R. Perkins an assignment of the right to use the invention within a certain specified territory; the plaintiffs, as partners, purchasing and holding one undivided half part, and Perkins purchasing the other undivided half part of the interest and right therein conveyed. On the 10th of December, 1852, Perkins assigned his undivided half part to C. G.



Andrews, whose administratrix, on the 5th of February, 1855, assigned the same to the defendants. Between the 5th of February and the 18th of March, 1857, the parties to this suit owned respectively one undivided half part of the rights under the assignment, and both sold machines containing the patented invention in the assigned territory. The defendants sold such machines to the number of seventeen more than were sold by the plaintiffs, for which they received their pay, making large profits thereon; but they refused to account with the plaintiffs therefor, though often requested. Before February 5, 1855, the owners of the interest under the assignment had been accustomed to sell and account together for all sales and profits.

*T. L. Wakefield*, for the plaintiffs.

*C. Browne*, for the defendants.

By Court, CHAPMAN, J. There is not in this country any limitation of the number of persons who may be joint owners of a patent right. In England it is otherwise. English letters patent contain a provision that if they shall at any time be vested in more than twelve persons or partners they shall become void. But the statutes of the United States, 1836, c. 357, sec. 11, makes patents assignable, either as to the whole interest or any undivided part thereof, by any instrument in writing; and licenses may also be granted by the patentees or their assignees to as many parties as they please. Many proprietors of patents have availed themselves of the right to make assignments, and grant licenses to a great extent; and there have been, for many years, a great number of persons interested, as part owners or licensees, in the question whether, independently of covenants or agreements, a right of contribution, in any form or to any extent, exists between such parties or any of them. The amount of property and the number of persons to be affected by this question must be very great. The question has arisen, and been propounded to counsel, in many instances; but after having made extensive inquiries, we cannot learn that it has ever before been presented to a judicial tribunal in any form. The learned counsel in this case have acknowledged their inability to find any authority in point, and have argued the question principally by analogy. The prevailing sentiment among patent lawyers, we have reason to believe, is adverse to the right; and many of them are in the habit of advising clients to make provision

on the subject, as well between part owners as licensees, by special agreements. The analogies which have been suggested by counsel, and those which have suggested themselves to our own minds, are quite unsatisfactory; because a patent right, as it exists in this country, is a species of property so unlike every other species, and is made profitable in so great a variety of ways. The authorities cited for the plaintiffs are those which relate to tenancies in common of real estate. But real estate is made profitable either by occupation with or without cultivation, or by renting it. And if either party is dissatisfied with holding it jointly or in common, he may have partition. But there is no provision for partition of patent rights; and they are so diverse in their nature that no general statement can be made as to the manner in which they are made profitable. Perhaps in a majority of cases the value of the right depends upon the peculiar circumstances and skill of the owner. At common law, no right of contribution existed between tenants in common of real estate. By statute 4 & 5 Anne, c. 16, if one tenant collects and receives more than his share of the rents and profits, he is made liable to contribution, and this statute has been adopted in Massachusetts: *Munroe v. Luke*, 1 Met. 463; *Calhoun v. Curtis*, 4 Id. 413 [38 Am. Dec. 380]. But the statute has not been held, either in England or here, to extend to patent rights. It may be added, that the law as to the respective rights of part owners of an interest in a patent right should be uniform throughout the United States, and cannot be affected by the law of any particular state in respect to real property.

There is some analogy between a patent right and a right of way. A patent right is a monopoly of a certain way of doing a thing. It is an exclusive right of way in the region of invention, secured to one for a limited period as a compensation for having first discovered it. It was never held that if one of several owners of a right of way over a tract of land used the way more than the other part owners did, he thereby became liable to them for contribution. The doctrine of contribution has never been held to apply to the use of rights of this character. Yet it would be unsafe to draw any conclusions from this to a patent right, because the analogy is so faint.

There is some analogy between a patent right and a right to take tolls; for the royalty is in the nature of toll for the use of the patented way or method. Both are incorporeal rights; and a patent is sometimes made profitable by simply

taking a royalty from those who use the invention, under an assignment or a license. If one tenant in common of a right to take tolls were to receive more than his share, a right of contribution would probably exist on the part of his co-tenant; but it would not be safe to apply the rule to patent rights, because the taking of tolls is simply the receipt of money for the use of the common property, but the use of patent rights and the contracts for royalties usually include other elements. The present case illustrates this remark. Each part owner sells his machines for a price supposed to include a royalty. But he must first invest money in the purchase of machines. Then he must expend labor, skill, and money in finding purchasers. And at the last, he must take the risk of losses. And each of these elements, and several others relating to the proceedings of the other party, must enter into an equitable adjustment of a contribution.

A patent right is a chattel interest; therefore a tenancy in common, or part ownership in it, is much like tenancy in common or part ownership of other personal property. But the use of a patent right is different from the use of any other property; and therefore it is not safe to follow the rules adopted in regard to the mutual liabilities of part owners of ships, horses, grain, liquor, etc. It would not be safe to conclude that because the owner in common of a horse is not liable, though he retains the exclusive use of him, therefore the part owner of the patent who uses it exclusively is not liable; nor because the tenant in common of the grain or liquor who uses it exclusively, and consumes it in using, is liable, therefore the part owner of the patent is liable. There is a possibility that the part owner of the patent may so supply the market as to appropriate to himself the whole value of the patent; and on the other hand, his use of it may have the effect to create a market so extensive as greatly to enhance the value of the whole patent. On the whole, then, we are compelled to reject all arguments from analogy, and look at the question upon its own apparent merits.

There is nothing restrictive in the grant of the defendants to the plaintiffs and Perkins, dated March 29, 1852. It assigns to them, their representatives and assigns, "the sole and exclusive right to use, and vend to others to be used (but not to build or make)," the machines in question, within the territory specified. It is agreed that Perkins was the purchaser of one half the right, though this is not indicated in the assign-

ment; and that this proportion of it was repurchased by the defendants from the administratrix of Andrews, to whom Perkins had sold his share. But the language used seems to convey to one as full a right to use and sell the machines as another. It is not in any respect distributive. Terms might easily have been used which would indicate the extent to which each party might use the right, and his liability in case he used it beyond the limitation specified; but such terms are omitted.

There is nothing to restrict the party owning each moiety of the right from selling and assigning that moiety, or any fractional part of it, or as many fractional parts as he pleases. Each may purchase as many machines as he pleases; and having purchased them, he may sell them to others with the right to use and sell them; or may refuse to sell them, and may rent them, or establish manufactories, either alone or in company with others, in which the machines shall be used. Or either party may neglect or refuse to purchase, use, or sell any machines or any rights, or to make his moiety profitable in any way. The right is thus subject to transfers and subdivisions, and may be used in a great variety of ways. None of the parties interested has any right to control the action of the other parties, or to exercise any supervision over them. It is difficult to see how an equitable right of contribution can exist among any of them, unless it includes all the parties interested, and extends through the whole term of the patent right. And if there be a claim for contribution of profits, there should also be a correlative claim for losses, and an obligation upon each party to use due diligence in making his interest profitable. It is not and cannot be contended that these parties are copartners; but the idea of mutual contribution for profits and losses would require even more than copartnership. Nothing short of the relation of stockholders in a joint-stock company would meet the exigences of parties whose interests may be thus transferred and subdivided.

But even as between the original parties, as there was no mutual obligation to contribute for losses, or to use any diligence to make the property profitable, and as each party was at liberty to buy, use, and sell machines at his pleasure, and to sell his moiety of the right, or fractional parts of it, we think no obligation arose out of the part ownership, as being legally or equitably incident to it, to make contribution of profits. But in the absence of any contract, we think each party was

at liberty to use his moiety as he might think fit, within the territory described. If the defendants have realized any profit in the manner alleged, it has been by investing capital in the purchase of machines, and the use of skill and labor in selling them; and they have taken the risk of losses. Apparently, there is no more reason why the plaintiffs should claim a part of the advanced price for which they may have sold their machines than there would have been for claiming a part of the price if they had sold their right itself for an advance. It may possibly be that the sale of the seventeen machines so far supplies the market that the plaintiffs' moiety of the right is greatly reduced in value; but if it be so, the consequence is very remote, and dependent upon a great variety of causes. There have been patented articles, in respect to which such a sale would have greatly enhanced the value of the other moiety of the right, by its tendency to create a demand. Such a consequence would also be remote.

These parties must be regarded as having interests which are distinct and separate in their nature, though they are derived from the same contract; and having such interests, with the right to use them separately, they cannot for any legal use of them incur any obligation to each other.

Plaintiffs nonsuit.

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## SEWALL v. BOSTON WATER POWER COMPANY.

[4 ALLEN, 277.]

**WHERE** OWNER OF CERTIFICATE OF SHARES IN CORPORATION SELLS PART OF THEM, and executes an assignment of the part so sold by partially filling up a blank form printed on the back of the certificate, being guilty of no want of care in the mode of filling the blank, and this assignment is afterwards altered so as to purport to assign the whole of the shares, and the corporation negligently transfers all the shares on its books, and issues to other parties a new certificate therefor, it will be liable to the true owner for the amount of shares thus wrongfully transferred.

**BILL** in equity against the Boston Water Power Company, John B. Neale, William W. Keith, Joseph W. Davis, William H. L. Smith, and Clark, Cheney, & Co., to compel them to procure for the plaintiff a certificate of 150 shares of the capital stock of the Boston Water Power Company, and to compel the Water Power Company to pay to him a dividend which had been declared on the shares. Other facts are stated in the opinion.

***I. F. Redfield and S. E. Sewall, for the plaintiff.***

***P. W. Chandler and G. O. Shattuck, for the Boston Water Power Company.***

**A. A. Ranney, for J. B. Neale.**

***J. B. Robb, for W. W. Keith and J. W. Davis.***

***F. A. Brooks, for Clark, Cheney, & Co.***

By Court, CHAPMAN, J. Upon the evidence as reported, the court are of opinion that, as between the plaintiff and the Water Power Company, his stock has been transferred and lost to him through their fault, and without negligence or fault on his part.

He had a single certificate for two hundred shares, on the back of which was printed a blank form, prepared by the company for an assignment of shares. He proposed to sell fifty shares, and employed Thomas R. Sewall, a broker, to make the sale. The shares were sold to William W. Keith, a broker, the name of his principal not being disclosed. The blank form for the assignment was then filled, so far as was necessary, by writing the word "fifty" in the proper space to indicate the number of shares sold, and with two marks in ink before it to indicate that nothing else should be written there; and also a line in ink drawn through the blank before the word "shares," to show that nothing should be written there. The date was filled up, and the assignment was then signed by the plaintiff and witnessed by his broker, who delivered the certificate, with this assignment of fifty shares on its back, to Keith. A blank was left for the name of the assignee, and also for the consideration. The assignment, as delivered, is copied in the margin.\*

\* In consideration of  
me paid, I do hereby sell and assign to

**Dollars, to**

**of**                         Fifty         **of the within named**                                      **Shares**  
**of the Corporate Stock of the BOSTON WATER POWER COMPANY.**

Witness my hand and seal, this 15 day of March A. D. eighteen hundred  
and sixty. S. E. SEWALL

Signed, sealed, and delivered, }  
in presence of }  
T. R. SEWALL.

The delivery gave to the holder the right to fill these blanks, but not to alter the part stating the number of shares assigned. By the exercise of ordinary care, any person could see on inspection that only fifty shares were assigned, and that the remaining 150 still belonged to the plaintiff. The plaintiff's broker testifies that this course is common, and there is no evidence to the contrary; and we cannot see why it is not a safe and prudent course. For any alteration in the number of the shares assigned would be obvious on inspection, as it was in this case, or else it must be done by a very ingenious forgery.

If there was an obvious alteration, it would be the duty of the defendants to ascertain whether it was authorized before making a transfer of the shares to the assignee; otherwise they would run the risk of its being unauthorized. If it was a forgery, it would be void, and no one could acquire a title under it, unless the plaintiff should be guilty of negligence in respect to it. If it were carried to the office of the company for the purpose of procuring a transfer of the fifty shares, the company would retain it; would issue a new certificate to the assignee of the fifty shares; and whenever the plaintiff should have occasion to take a new certificate for his 150 remaining shares, the files and books of the company would show that he was still the owner of them, and had not transferred them. His property ought to be as safe without a certificate as with one.

The real purchaser was John B. Neale, and the certificate was delivered to him. He filled the proper blank with the words "J. B. Neale, trustee," and probably inserted the word "ten" in the blank for the consideration. Having occasion to borrow money of Clark, Cheney, & Co., on a pledge of fifty shares, he erased the words "J. B. Neale, trustee," and left the certificate with them, in order that they might get the shares transferred. Their clerk, J. E. Bullard, was by some misunderstanding led to believe that the remaining shares belonged to Allen, Neale, & Co., a firm of which Mr. Neale was a member. He accordingly wrote in the blank from which Neale's name was erased the words "J. E. Bullard, Trt. 50; Allen, Neale, & Co., 150"; which was intended to indicate that all the shares were sold, but leaving the language of the assignment absurd and contradictory. If this had been done fraudulently, it would have been a forgery; but there seems to have been no fraud, and it was merely an act of gross carelessness



and wholly unauthorized. He carried the certificate to the office of the company, either in this condition, or with the additional alteration of an erasure of the word "fifty." He found at the treasurer's office J. W. Le Barnes, the clerk of the treasurer. Common prudence would have dictated to him to refuse to transfer the shares on the strength of an assignment thus mutilated and altered, and so contradictory and absurd as it then was. Without any fraudulent intent, but with gross carelessness, he undertook to alter the assignment still more. Probably he erased the word "fifty," though this may have been done by Bullard. He wrote upon the ink line "two hundred," in the space before "shares"; inserted in another space the word "all," and erased a superfluous "of"; and thus, by his own act, made it a proper assignment of the plaintiff's shares, so far as its language was concerned. After these various alterations, the assignment stood as represented in the margin.\*

Bullard then transferred the shares in accordance with this assignment. Allen, Neale, & Co., to whom 150 of the shares were issued, become insolvent, and the shares were assigned to Keith, as trustee, and a certificate was issued to him accordingly. Keith subsequently transferred 25 shares to Davis, and 125 to Smith. Of these, one hundred yet stand in the name of Smith, and the remaining fifty cannot be distinctly traced. For the wrongful act of the treasurer's clerk in transferring the 150 shares, under the circumstances stated, the Water Power Company are responsible.

The authorities cited show that a certificate of stock is not a negotiable instrument; and without any authorities it is apparent that it has not a negotiable character. But this point is not material. If the plaintiff's carelessness had been such as to excuse the transfer of the stock to other parties, he could not now claim the stock. The case of *Young v. Grote*, 4 Bing.

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\* In consideration of ten Dollars, to  
me paid, I do hereby sell and assign to ~~J. B. Neale, Trustee,~~

*J. M. Bullard, Trt. 50*

*Allen, Neale, & Co. 150*

of *all*       *Fifty*       of the within named       *Two hundred*       Shares  
of the Corporate Stock of the BOSTON WATER POWER COMPANY.

Witness my hand and seal, this 15 day of March A. D. eighteen hundred  
and *sixty*. S. E. SEWALL.

Signed, sealed, and delivered, }  
in presence of }  
T. R. SEWALL.

253, related to a negotiable instrument. The plaintiff's agent had filled up his check so carelessly that it did not carry on its face any notice to the banker that it had been altered, and its payment by the banker was excused by this fault of the plaintiff. *Coles v. Bank of England*, 10 Ad. & E. 437, was a case of the transfer of the stocks which were not negotiable. The transfer by the bank was excused because the testator had conducted in the matter with gross carelessness. Therefore, whether the paper be negotiable or not, the law is the same: the plaintiff must exercise reasonable care, adapted to the circumstances of the case; and so must the defendant.

We need not discuss the doctrine of estoppel alluded to in argument, because we do not put the case on that ground.

As to the other defendants, it was proper to make them parties, because they have been parties to the transfer of the 150 shares of stock. Upon the evidence, Neale and some of the other parties would probably be liable to the plaintiff in an action at law for their participation in the unauthorized transfer. By direction of Neale, the shares were transferred from Clark, Cheney, & Co. to Keith, in trust, and by him to Smith and Davis, in conformity with sales that Neale had made. What claim the Water Power Company may have upon any of these parties cannot be decided in this case. But the plaintiff, having demanded of the company a certificate of 150 shares, had a right to it, and to the shares represented by it. He has also a right to the dividends which have been declared on these shares since they have been withheld from him. As it appears that the shares are constantly for sale in market, the payment to him of their market price at the time of entering the decree will be a full and adequate compensation for them; and an alternative decree may be entered, the plaintiff consenting to it, either for the transfer to him of 150 shares, or their market value in money.

There being no occasion for any decree as to the other parties, and there being equities as between them and the Water Power Company that cannot be settled in this suit, the bill may be dismissed as to them, without costs to either party.

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CORPORATION PERMITTING SHARES OF STOCK TO BE TRANSFERRED, WITHOUT AUTHORITY from the stockholder, may be compelled to replace them, or pay him their value, although it was innocently deceived by a forged power of attorney: *Pollock v. National Bank*, 57 Am. Dec. 520, note 521, where other cases are collected. An action at law for damages lies against a corporation for tortiously or negligently transferring or issuing certificates of stock: *Salis-*  
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*bury Mills v. Townsend*, 109 Mass. 121, citing the principal case. The owner of stock cannot, without consent or negligence on his part, be deprived of his shares of stock, and he may compel the corporation to issue shares, and pay the dividends on shares lost by a forged power of attorney: *Pratt v. Taunton Copper Co.*, 123 Id. 112, also citing the principal case. And where a party wrongfully sells shares of stock belonging to another, he must replace them, or enable the owner to do so for himself: *Fowle v. Ward*, 113 Id. 551, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Shaw v. Spencer*, 100 Mass. 388, to the point that certificates of stock transferred in blank are not negotiable instruments; and in *Greenfield Savings Bank v. Stowell*, 123 Id. 203, to the point that in reference to alterations in a written instrument, there is a distinction between a case where a party delivers the paper purposely incomplete, to be filled up, and where he does not do so.

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## COMMONWEALTH v. SHAW.

[4 ALLEN, 308.]

ILLUMINATING GAS MAY BE SUBJECT OF LARCENY.

PERSON MAY COMMIT LARCENY OF ILLUMINATING GAS by secretly opening gas company's service-pipe on his premises, and connecting the same with another pipe, through which he secretly and fraudulently receives and uses the company's gas, after it had closed the service-pipe and removed its meter.

INDICTMENT for the larceny of illuminating gas of the Boston Gas Light Company. The judge instructed the jury that if they were satisfied that the defendant took the gas with a felonious intent, she was guilty of larceny. The jury returned a verdict of guilty. The other facts are sufficiently stated in the opinion.

*J. F. Pickering*, for the defendant.

*G. P. Sanger*, district attorney, for the commonwealth.

By Court, BIGELOW, C. J. We cannot doubt that the instructions given to the jury in this case were right. There is nothing in the nature of gas, used for illuminating purposes, which renders it incapable of being feloniously taken and carried away. It is a valuable article of merchandise, bought and sold like other personal property, susceptible of being severed from a mass or larger quantity, and of being transported from place to place. In the present case, it appears that it was the property of the Boston Gas Light Company; that it was in their possession by being confined in conduits and tubes, which belonged to them, and that the defendant severed a portion of that which was in a pipe of the company, by tak-

ing it into her house and there consuming it. All this being proved to have been done by her secretly, and with an intent to deprive the company of their property, and to appropriate it to her own use, clearly constituted the crime of larceny.

It was suggested by the counsel for the defendant that if she was guilty of any offense, it was not larceny, but embezzlement, inasmuch as it appeared that the gas was intrusted to her possession by the company, and that at the time of the alleged felonious taking, she was the bailee thereof. But the facts proved entirely negative the existence of any such relation between her and the company. The gas was not in her possession. On the contrary, the pipe had been severed from the meter by closing a stop-cock in the service-pipe, which belonged to the company, for the very purpose of preventing her obtaining possession of it. The fact that the end of the pipe was on the premises occupied by her is wholly immaterial. It was not placed there to be in her custody or control, and she had no possession of it or its contents. The facts proved at the trial are similar to those which were shown to exist in the case of *Regina v. White*, 6 Cox C. C. 213, in which a conviction of the defendant for the larceny of gas was affirmed by the court of criminal appeal. That case, however, was not so strong against the defendant as the present one, because it there appeared that the owners of the gas had not caused it to be shut off from the premises of the defendant, to prevent him from making use of it.

As it is admitted that the acts charged on the defendant were committed prior to the time when statutes of 1861, c. 168, took effect, its provisions can in no way affect the present case.

Exceptions overruled.

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LARCENY, WHAT CONSTITUTES: See *State v. South*, 75 Am. Dec. 250, note 253, where other cases are collected.

ILLUMINATING GAS MAY BE SUBJECT OF LARCENY: See note to *State v. Homes*, 57 Am. Dec. 276.

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## CARRIER v. SEARS.

[4 ALLEN, 336.]

DEFENSE THAT PLAINTIFF PROCURED INDORSEMENT OF PROMISSORY NOTE BY UNDUE INFLUENCE from the payee, when he was of unsound mind and incapable of making a valid indorsement, is not available in an action by the indorsee against the maker, if neither the payee nor his representatives have ever disaffirmed the indorsement; nor is it a defense to such

action that the payee, for a valuable consideration, agreed to give up the note at his death to the maker, reserving meantime the right to collect the interest thereon.

**ACTION** by the indorsee against the maker of a promissory note. The opinion states the case.

*J. D. Colt and T. P. Pingree, Jr.*, for the plaintiff.

*H. W. Bishop and J. Tucker*, for the defendant.

By Court, HOAR, J. This action is by the indorsee of a promissory note against the maker; and the defendant offered to prove that the plaintiff procured the indorsement by undue influence from the payee, when he was of unsound mind and incapable of making a valid indorsement. This evidence was rejected, and we think it ought not to have been admitted. An indorsement is a contract; and the contract of an insane person, or one obtained by fraud or duress, is voidable and not void: 2 Bla. Com. 291; 2 Kent's Com., 6th ed., 451; *Seaver v. Phelps*, 11 Pick. 304 [22 Am. Dec. 372]; *Allis v. Billings*, 6 Met. 415 [39 Am. Dec. 744]; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Gibson v. Soper*, 6 Id. 279 [66 Am. Dec. 414]. The right to avoid it is a personal right, which can only be exercised by the insane person, or his guardian, or representatives. The contract is binding upon the party who is of sound mind, and his rights under it are not affected until it is avoided by the party entitled to disaffirm it. The property passes as to third persons.

The only case cited by the defendant upon this point is *Peaslee v. Robbins*, 3 Met. 164. That was an action upon a note by an indorsee against the promisor, and evidence was offered tending to prove that the payee, when he indorsed the note, had not sufficient mental capacity to make a valid transfer of it. To establish this, evidence was admitted as to his incapacity at the time the note was made to him, as well as after; and the admissibility of this evidence was the question raised upon the bill of exceptions. This court held that it was admissible, as tending to show his state of mind at the time he indorsed it. Whether his want of mental capacity was a defense of which the defendant could avail himself does not appear to have been questioned by either party, or by the court. Judge Wilde, in delivering the opinion, says: "The plaintiff is bound to show a legal transfer of the note, by proof of the handwriting of the indorser; and it follows, as a necessary consequence, that the defendant must be allowed to

impeach the plaintiff's title to the note by showing that the indorsement was void. Evidence, therefore, of the indorser's mental incapacity to make a valid contract, at the time he indorsed the note, was material evidence; and not the less material because the same incapacity existed when the note was signed." These remarks of the learned judge, unexplained, would certainly countenance the position taken by the defendant in the case at bar; and the report, as it stands, does not afford the necessary explanation. The point decided was only that evidence of insanity at one time was competent as tending to prove insanity at a time shortly after. But the fact in the case was, as I well remember, that the defendant had been notified by the guardian of the insane payee not to pay the note to the plaintiff; and the defense was conducted by the guardian for the benefit of his ward. We have examined the record, and find, in the original specification of defense, the statement "that said Fletcher, as guardian to said Parker (the payee of the note), claims said note as the property or estate of said Parker." There was no controversy upon this point; and the guardian having claimed and exercised the right to disaffirm and avoid the indorsement, the only question was upon the mental incapacity of the payee at the time the indorsement was made. The language of the court was therefore perfectly warranted in its application to the circumstances of the case, as it was presented and understood by the parties, but would require limitation if taken as the enunciation of a general principle.

The other exception stated in the report is equally untenable. The plaintiff took the note when it was overdue, and therefore subject to any defense which would have been effectual if the action were by the payee. But the contract on which the defendant relies was an executory contract, not affecting in any degree the binding force of the note at the time it was indorsed. The payee had agreed, it is said, to give up the note at his death to the maker, reserving the right to collect the interest in the mean time; and this agreement was made upon a valuable consideration. But is very clear that this agreement could not have been pleaded as a defense to an action upon the note. If the interest had not been paid in an action on the note, a recovery must have been had, not only for the interest, but the principal. But one suit could have been maintained upon it; and it would then have been impossible to ascertain for how many years the interest might

become payable, if the principal were not collected. As was said by Mr. Justice Dewey, in *Allen v. Furbish*, 4 Gray, 510 [64 Am. Dec. 87], "the parol evidence would, if competent, prove that the plaintiff had not performed a stipulation on his part to deliver up the note on the happening of a certain event."

The consideration of the agreement to deliver up the note at the death of the payee cannot be treated as a payment, because the note by the agreement was to continue in force as a note on which the whole interest was annually to be due and payable.

Nor can any debt due from the payee to the maker be allowed; because, 1. There is no answer in set-off; and 2. There was no proof of any debt incurred by the payee; his promise to give up the note being the only contract proved on his part.

Judgment on the verdict.

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DEED OF INSANE PERSON, VALIDITY OF: See *Corbit v. Smith*, 71 Am. Dec. 431, note 439, where other cases are collected. The deed of an insane person is ineffectual to convey a title to land good against the grantor or against his heirs and devisees, unless it is confirmed by the grantor himself when of sound mind, or by his legally constituted guardian, or by his heirs or devisees: *Valpey v. Rea*, 130 Mass. 384, citing the principal case.

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## BARNES v. CHAPIN.

[4 ALLEN, 444.]

OWNER OF SUCKING COLT KICKED AND KILLED BY HORSE which has been turned loose in the highway, without a keeper, while it is following its dam led by her owner in the highway, he being in the exercise of reasonable care, may recover damages of the owner of the horse, although the horse was not vicious.

TORT for the value of a colt kicked and killed by the defendant's mare. The plaintiff was leading his mare in the highway, and her sucking colt, three weeks old, was near her, unfastened, and the defendant's mare, which had been turned loose into the highway, ran up and chased the colt and kicked and killed it. There was no evidence that the defendant's mare was vicious. The defendant requested the judge to charge the jury that the plaintiff could not recover unless the defendant's mare was vicious, and known by him to be so; and that the plaintiff could not recover, inasmuch as it appeared that the colt, as well as the defendant's mare, was at



large, and not under the control of a keeper. The judge declined to so rule, and instructed the jury that if, considering the age of the colt, the plaintiff was in the exercise of reasonable care, he was entitled to recover. The jury found for the plaintiff.

*S. O. Lamb and G. T. Davis*, for the defendant.

*S. T. Field*, for the plaintiff.

By Court, CHAPMAN, J. The general doctrine of the common law as to injuries done by domestic animals seems to be that the owner is not liable, unless he has been in some fault. He is liable for their trespasses when it was his duty to confine them, and he has neglected to do so. In *Leame v. Bray*, 3 East, 595, Lord Ellenborough says: "If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass."

In this case, the verdict of the jury, under the instructions of the court, finds that the plaintiff was using ordinary and reasonable care in traveling on the highway. The facts reported furnish no reason to doubt the correctness of the verdict on this point. The suggestion of the defendant's counsel, that reasonable care required the plaintiff to confine by a halter a colt three weeks old, while it was traveling by the side of its dam, the plaintiff being present and leading the dam by a halter, might be properly addressed to the consideration of the jury, but does not come within the scope of judicial determination.

As to the defendant, it appears that he was in fault in permitting his mare to go at large on the highway without a keeper. Highways are dedicated to the use of travelers. In this commonwealth, it has long been regarded as inconsistent with the safety and convenience of travelers to permit horses to go at large on the highway; and such an act is an offense against our statutes. As the plaintiff was using reasonable care, and as the defendant's fault concurred with the act of his animal in causing the injury to the plaintiff's property, the action is well maintained.

Exceptions overruled.

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OWNER OF HORSE, WHETHER GUILTY OF NEGLIGENCE IN PERMITTING HIM TO RUN AT LARGE: See *Waters v. Moss*, 73 Am. Dec. 561, note 562, where other cases are collected. When a horse is turned loose on a highway, and

there kicks a colt running by the side of its dam, the owner of the horse is liable for the damage: *McDonald v. Snelling*, 14 Allen, 287; *Kellogg v. Chicago & N. W. R'y*, 28 Wis. 280, both citing the principal case. A person is guilty of negligence in doing that from which injury might reasonably have been expected, and from which injury resulted: *Lane v. Atlantic Works*, 111 Mass. 141, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Lyons v. Merrick*, 105 Mass. 77, to the point that a plaintiff is not bound to prove alleged viciousness of the defendant's animal, and his knowledge thereof, where there is enough stated in the declaration to charge the defendant with negligence; and in *Card v. Ellsworth*, 65 Me. 552, to the point that individuals who have or maintain upon highways obstructions which cause fright in horses are, in Massachusetts, liable to travelers for injury occasioned thereby.

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## TUTTLE v. STANDISH AND TRUSTEES.

[4 ALLEN, 481.]

OWNER OF LOST NOTE CANNOT MAINTAIN ACTION AT LAW AGAINST INDORSER in a case where a bond to indemnify the defendant against being called on a second time to pay the note will not afford him an adequate protection.

CONTRACT against the indorser of a note signed by one Pritchard, and given by him as a business note to the defendant, to whose order it was payable, and by whom it was indorsed to one Newell, who transferred it to the plaintiff before its maturity. The judge directed a verdict for the plaintiff. Other facts appear from the opinion.

*G. M. Stearns*, for the plaintiff.

*J. Wells*, for the defendant.

By Court, HOAR, J. The principles upon which the right to recover on a lost note depends have been fully considered in a case which came before since this case was argued: *Tower v. Appleton Bank*, 3 Allen, 387. The general rule is, that where the writing is merely the evidence of a contract, the loss or destruction of the writing does not destroy the cause of action, but renders secondary evidence admissible. But where, from the nature of the contract, the party answerable upon it is entitled to have the writing delivered up to him, for his security, or to enable him to enforce his rights under it, when he is called upon to perform it, as in the case of a negotiable bill or note, if it is lost or destroyed, an action cannot be maintained upon it, unless his rights can be fully secured by a bond of indemnity, or other sufficient security. In the case of the maker of a negotiable promissory note payable to bearer,

or indorsed in blank, the maker being the party ultimately chargeable, the only hazard to which he is exposed is that he may be called upon a second time to pay it to a *bona fide* holder; and against this risk a bond of indemnity seems to afford an adequate protection. The acceptor of a bill of exchange is in a similar position, except that he may want the bill as a voucher in his settlement with the drawer. But even in these cases, the settled doctrine in England and in New York has been, that the only remedy was in equity, if the note or bill was lost; their courts considering that a court of law had no authority to order an indemnity to a defendant, as a condition of the plaintiff's right to recover. This doctrine has been recently modified by statutory provisions.

In the absence of general equity powers, it was early held in this commonwealth that the owner of a lost note might recover against the maker, upon giving a bond of indemnity, and that a court of law might require such a bond to be given: *Jones v. Fales*, 5 Mass. 101; *Fales v. Russell*, 16 Pick. 315; *Almy v. Reed*, 10 Cush. 421. But all the considerations against allowing such a recovery apply more forcibly to the case where payment is demanded of an indorser; for he is entitled to the possession of the note, in order to have his recourse over against the maker: Story on Notes, sec. 108; and see *Smith v. Rockwell*, 2 Hill, 482. And it is apparent that a mere bond of indemnity against being compelled to make a second payment is usually no sufficient substitute to the indorser for the production and delivery of the note. In pursuing his remedy over, he needs the instrument as the evidence of his own right. When he has received it from the indorsee by payment, it still retains its negotiable quality. He may wish to dispose of it to a purchaser. If he may do this by an indorsement on a copy, when the original is lost, how is he to transfer or preserve the evidence necessary to make it available? He may have occasion to transmit it for collection to distant places, and the mass of evidence to supply its place is by no means equally transmissible, or equally permanent. If he sues the maker, he is not only put to additional trouble and inconvenience in establishing his claim, but is obliged in his turn to furnish a bond of indemnity. There are many cases in which it is difficult to see how a complete equivalent for all that he loses in the loss of the paper can be secured to him.

It is very evident that if one is bound by contract to furnish a negotiable note to another, it would be no legal or equitable

performance of that obligation to furnish evidence that the note has been lost or destroyed, and to assign the mere right of property in the contract of which the missing paper was the evidence.

There was no case cited at the argument in which there had been a recovery at law against an indorser on a lost note. In *Jones v. Fales*, 5 Mass. 101, the action was upon several notes; and a part of them were indorsed by the defendant, and on the others he was promisor. The court, in their opinion, make no distinction as to his liability in these different capacities. But it is to be observed of that case: 1. That no point respecting such a distinction was made or presented to the court; 2. That the notes were lost from the files of the court, so that one party was no more responsible for the loss than the other; and 3. That the notes were found before any judgment was rendered. It is not, therefore, an authority of much weight upon the question now before us. In *Freeman v. Boynton*, 7 Mass. 486, it was said by Mr. Justice Parker that a demand on the maker upon a lost note would be sufficient to charge the indorser, if accompanied with a tender of sufficient indemnity; which would seem to imply that a claim upon it might be maintained against the indorser; but the point was not decided.

In *Renner v. Bank of Columbia*, 9 Wheat. 581, a judgment was recovered against an indorser upon a lost note; but no point was made of any distinction between his case and that of a promisor. In that case, also, it appeared that there had been a previous suit against the maker, in which the note had been used.

Considering the point an open one in this commonwealth, we do not mean to say that the reasoning of the court in *Fales v. Russell*, 16 Pick. 315, is not, in many cases, as applicable to the case of an indorser as of a promisor. If, for example, the note were proved to have been made for the accommodation of the indorser, a simple bond of indemnity might be a sufficient protection to the defendant. If the holder had previously recovered a judgment against the maker, an assignment of the judgment, with such a bond, might secure his rights substantially. And these securities might perhaps be as well afforded in a suit at law, as a condition of the issuing of an execution, as in a suit in equity. But with the full equity jurisdiction now existing in Massachusetts, it cannot be necessary to attempt to extend the functions of a court of law to

any doubtful cases, for which equity affords a more appropriate remedy. That jurisdiction allows so much greater latitude in adapting its processes and decrees to the particular circumstances of each case, that with its power of embracing and adjusting in one suit the rights and claims of all parties in interest, it seems to furnish the proper tribunal for the prosecution of a claim like that which we are now considering. A simple bond of indemnity would not be an adequate protection to the defendant; and it would be a novel, and as it seems to us an impracticable, course to attempt to devise and impose an obligation on the plaintiff to do all the affirmative and positive acts which the assertion of the defendant's rights against the maker of the note might hereafter require.

Whether even a court of equity could give relief, might depend upon circumstances not fully developed.

The objection to the plaintiff's recovery not being the want of an original cause of action, nor that the cause of action has been extinguished, but that he is unable, perhaps by a misfortune only temporary, to produce the paper necessary as the foundation of a judgment, it seems to us that he should have the election to become nonsuit, if he shall be so advised; otherwise, the verdict to be set aside, and judgment entered upon the report for the defendant.

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**ACTION ON LOST NOTE:** See *Moore v. Fall*, 66 Am. Dec. 297, note 298, where other cases are collected.

**OWNER OF LOST NOTE CANNOT MAINTAIN ACTION AT LAW AGAINST INDORSER,** where a bond of indemnity would not fully protect the defendant: *Savannah National Bank v. Haskins*, 101 Mass. 376, citing the principal case. The indorser of a promissory note is entitled, upon taking it up, to the possession thereof, in order that he may have his recourse against the maker, or negotiate it again: *McGregory v. McGregor*, 107 Id. 547, also citing the principal case. See also *Tower v. Appleton Bank*, ante, p. 665, and note.

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## CITY OF SPRINGFIELD v. HARRIS.

[4 ALLEN, 494.]

**OWNER OF LAND OVER WHICH NATURAL STREAM FLOWS HAS RIGHT TO REASONABLE USE OF WATER** for mills or other purposes, and is not liable for obstructing or using the water for his mill, if his dam is only of such magnitude as is adapted to the size and capacity of the stream and to the quantity of water usually flowing therein, and his manner of using the water is not unusual or unreasonable, according to the general custom of the country in cases of dams upon similar streams.

TORT for the obstruction of a natural stream of water by means of a dam. The facts are stated in the opinion.

*N. A. Leonard*, for the plaintiffs.

*J. Wells*, for the defendant.

By Court, MERRICK, J. It appears from the pleadings and from the facts stated in the bill of exceptions that Garden Brook is a natural stream running by and over the land of the defendant, and thence through Main Street in the city of Springfield. The plaintiffs claim to be owners in fee of all the land included within the limits of said street, and that they are entitled to have the water flow in said stream at all times without obstruction, in order that they may use it, as they have a right to do, for sewerage, for extinguishing fires, and for all other purposes essential to the health and safety of the city. The defendant is the owner and occupant of a mill standing upon his said land; and he admits that during the whole period in which the obstruction complained of is alleged to have occurred, he has, in operating his mill and the works contained in it, used the water of said stream by means of a dam, which, for that purpose, he has erected and maintained across it. The plaintiffs in their declaration allege that this dam was and is "of a larger magnitude than is adapted to the size and capacity of the stream, and to the quantity of water usually flowing therein." And this is the particular grievance of which they complain, and which they set forth as their cause of action against the defendant.

The action can be maintained only by the proof of this material allegation; for the defendant had a right to use the water in a reasonable and lawful manner to work and operate his mill, whatever might be the effect of such use in reference to any easement to which proprietors of land situate at any point below it might otherwise be entitled. Each proprietor of land through which a natural watercourse flows has a right as owner of such land, and as inseparably connected with and incident to it, to the natural flow of the stream for any hydraulic purpose to which he may think fit to apply it; and it is a necessary consequence from this principle that such proprietor cannot be held responsible for any injurious consequences which result to others, if the water is used in a reasonable manner, and the quantity used is limited by and does not exceed what is reasonably and necessarily required

for the operation and propulsion of works of such character and magnitude as are adapted and appropriate to the size and capacity of the stream and the quantity of water usually flowing therein: *Thurber v. Martin*, 2 Gray, 394 [61 Am. Dec. 468]; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Tourtellot v. Phelps*, 4 Id. 376.

The jury having found, under instructions in matter of law which are admitted to have been correct and unobjectionable, that the plaintiffs have failed to establish the material allegations in their declaration relative to the dam erected and maintained by the defendant across the stream, and having also found that the said dam is only of such magnitude as is adapted to the size and capacity of the stream and to the quantity of water usually flowing therein, and that the manner in which he used the water was not an unusual or unreasonable use of it, according to the general custom of the country in cases of dams upon similar streams, it is obvious that the plaintiffs were not entitled to recover any damages, and therefore that the verdict was properly rendered for the defendant.

It is objected that the court erred in ruling that the plaintiffs had not upon the evidence shown that they had acquired any prescriptive right to the water in the brook, and in directing the jury for that reason to return a verdict for the defendant. It would have been more regular to reserve these directions, which were predicated wholly upon questions of law, and to submit to the jury the questions of fact in issue, which were specially submitted to them with instructions that if they found the first in the affirmative and the second in the negative, they should, in that case, render a verdict for the defendant. But as we do not perceive that the plaintiffs were at all prejudiced or subjected to any disadvantage by the course pursued, such irregularity affords no sufficient cause for disturbing the verdict, which was rendered exclusively upon particular questions of fact which were wholly independent of and distinct from the questions of law. And as the finding of the jury upon those particular questions makes it certain that the plaintiffs could in no event maintain their action, it becomes unnecessary to consider whether the ruling of the court in relation to the plaintiffs' alleged title was correct; for whether they owned the soil, or had acquired any prescriptive right to the use of the water, or were mere riparian proprietors, it is obvious that judgment must necessarily, upon the



finding of the jury upon those questions of fact, be rendered for the defendant.

Exceptions overruled.

CHAPMAN, J., did not sit in this case.

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LIABILITIES OF OWNERS OF DAMS FOR INJURIES: See *Fraser v. Sears Union Water Co.*, 73 Am. Dec. 562, note 564, where other cases are collected.

REASONABLENESS OF USE OF STREAM BY RIPARIAN PROPRIETOR: See *Snow v. Parsons*, 67 Am. Dec. 723, note 727, where other cases are collected.

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## JUDSON v. WESTERN RAILROAD CORPORATION.

[4 ALLEN, 520.]

RAILROAD COMPANY IS RESPONSIBLE AS WAREHOUSEMAN ONLY, AND NOT AS COMMON CARRIER, for goods to which something remains to be done by the consignor or his agents, after their delivery to the company, before they are in a condition for transportation. Where, therefore, an arrangement exists between two railroad companies by which goods which have been carried to the end of one road, and are destined to some point upon or beyond the line of the other, are delivered to the second company with expense bills, upon receipt of which, if correct, way-bills are made out, such second company is, until the delivery of the expense bills, responsible only as warehousemen, and not as common carriers, for goods so received and stored by it.

CONTRACT to charge the defendants as common carriers for the loss of goods destroyed by an accidental fire in the defendants' freight depot. The opinion states the facts.

*J. D. Colt*, for the defendants.

*H. Morris*, for the plaintiff.

By Court, MERRICK, J. It is, undoubtedly, a general rule that the liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents or servants, at the place appointed or provided for their reception, when they are in a fit and proper condition and ready for immediate transportation: *Redfield on Railways*, 246. But, like all other general rules, it is subject to modifications resulting from the express stipulations of the parties, or from the course and usages of trade and business. And as it sometimes happens that a party is at once a warehouseman and a carrier, and that goods received by him are lost and destroyed before they are put *in itinere*, a very important question may in such case arise, whether the receiver is liable in the one or the other

capacity; for his responsibility is not co-extensive in each of those relations: Story on Bailments, sec. 535. This must always be a question of fact to be determined upon proof of the actual and surrounding circumstances, the material point of inquiry being whether the one or the other character predominated in the particular stage of the transaction when the disaster occurred: *Id.*, sec. 536. There are well-settled rules which will afford some aid in the solution of such a question. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods: *Id.*, sec. 536; *Fitchburg and Worcester R. R. v. Hanna*, 6 Gray, 539 [66 Am. Dec. 427]. But on the contrary, if the goods, when so deposited, are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done, or some further direction is given or communication made concerning them, by the owner or consignor, the deposit must be considered to be in the mean time for his convenience and accommodation, and the receiver, until some change takes place, will be responsible only as a warehouseman.

These being the rules by which the rights of the parties are to be determined, it can of course make no difference by whom the property is delivered, whether it be by the owner himself, or by his agent or servant, nor whether that agent be himself a carrier or acts in any other capacity. It is the paramount duty of a common carrier to receive and carry all goods offered him for transportation, upon the payment or tender of a suitable fare or compensation; and he must so receive them, by whomsoever they are brought to the place where he makes arrangements to receive them for transportation: Story on Bailments, sec. 508. It is upon this principle, where no special obligation is imposed by acts of legislation, that one corporation whose railroad connects with or is near to the termination of the railroad of another corporation is obliged to accept and receive for transportation any goods which may be brought and tendered to it by the servants of the latter. But in this as in all other cases the party bringing the goods must first do whatever is essential to enable the carrier to commence or to make needful preparations for commencing the service required of him, before he can be made

liable or subjected to responsibility in that capacity. When goods are received by a railroad company which are to be transported to a place beyond their own road over a railroad which connects with theirs, or over successive roads or lines of transportation, each company will be responsible for them while in its own possession, and will not be liable for any loss which may occur after a due delivery of them upon another line and to another carrier: *Nutting v. Connecticut River R. R.*, 1 Gray, 502. If after being once laden for carriage they are transported over successive roads in the same car or vehicle without being shifted or changed from one to another, the successive carriers, as they severally receive them, will be liable for the goods in that capacity as soon as delivered; so that during the whole transit or journey some one will be constantly liable for them as a common carrier. But it is otherwise when one has performed his whole duty as a carrier, and has relieved himself from all liability in that capacity, by depositing the goods at the end of the journey in his own warehouse, from which they are to be taken by the owner or consignee, or by other carriers who are to continue the transportation to a still distant point. In such case, the liability of a warehouseman will succeed, and will continue until they come into the possession of some one who is responsible as a common carrier: *Norway Plains Co. v. Boston and Maine R. R.*, 1 Gray, 263 [61 Am. Dec. 423]; *Garside v. Trent and Mersey Nav. Co.*, 4 Term Rep. 581; *Hyde v. Trent and Mersey Nav. Co.*, 5 Id. 389; *Denny v. New York Cent. R. R.*, 13 Gray, 481 [74 Am. Dec. 645]. And so it may occur that one party will be liable only as a warehouseman after he shall have completed all the services in the way of transportation which can be required of him, and another liable only in the same relation before the further transportation has commenced, or before he has become responsible in another and distinct relation.

In applying these principles to the facts which were developed upon the trial of the present action, there is no difficulty in determining what are the rights and obligations of the parties. From the statements in the bill of exceptions, it appears that the plaintiff's goods, contained in two boxes marked "G. C. Judson, Springfield, Mass., by railroad," were delivered at Fonda in the state of New York, to the New York Central Railroad Company for transportation. That company gave to the plaintiff upon receiving the goods a "shipping receipt," by the terms of which they agreed to transport them to their ware-

house at Albany, to be there delivered to the party then entitled to receive them. The defendants' road was the connecting line over which the transportation of the goods was to be continued to the plaintiff at Springfield. But the two railroads do not unite by coming into any actual connection with each other. The former terminates at its freight-house in the city of Albany on the western side, and the latter terminates at its freight-house on the eastern side of the Hudson River. So that goods which are brought over the road of the former company, and are to be carried forward to some point or station on the road of the latter, must be unladen from the cars in which they are brought to Albany, and carried across the river and deposited in the freight-house of the Western railroad, and there be again laden in their cars. While remaining in their warehouse, the goods may therefore be in their possession as warehousemen. Whether they are liable in that capacity, or as common carriers, must be determined upon the facts relating to each particular transaction.

It appears from the evidence produced at the trial that by the course of business between these two roads it is the practice of the Central road, upon the arrival of freight from points on the line of its road destined for points on the line of the Western Railroad, to make out bills called expense bills, containing the freight charges of the Central road upon each parcel or lot of freight, and to send the goods by carmen with the expense bills across the river to the freight-house of the Western railroad, where the goods are compared by the agents of the latter road, and if found to be correct, are checked and handed to a clerk, who enters them on the books of freight received, from which the way-bills are made out. Upon the arrival of the plaintiff's goods at Albany, they were sent across the river by the New York Central Railroad Company in the usual manner, and were delivered at the freight-house of the defendants at the usual place of depositing such freight, and notice thereof was given to their proper servants. Upon the question whether the expense bills were delivered to any such agent or servant before the loss and destruction of the goods by the fire, which occurred while they remained in the freight house, the evidence was conflicting and contradictory. The defendants requested the court to instruct the jury, that in view of the course of business and usage between the two roads, although the goods were delivered to the proper agent of the defendants, yet if the expense bills were not also deliv-

ered before the occurrence of the fire by which they were destroyed, the goods were not in condition for immediate transportation, and the defendants were therefore liable only in their capacity as warehousemen. To this request the court declined to accede.

The general instructions which were given to the jury respecting the liability of the defendants and the capacity in which they were liable, whether as carriers or as warehousemen, were correct. But it is apparent from the uncontested evidence in the case that according to the usage and the general course of business, and from the regulations established by the two companies, until the expense bill was furnished to the defendants, the goods delivered at their freight-station were not in condition for immediate transportation. That document was indispensably necessary to them, to enable them to undertake the transportation of the goods. It was indispensable in order to identify the package or parcel to be carried, and also to show the amount of the lien upon them in favor of the Central company for the previous transportation from Fonda to Albany, and for which, upon accepting them, the defendants, by the usage between the two companies, would become responsible; and it afforded the only means by which they could make out their own freight-bill, or know what disposition was to be made of the goods, or what was the place of destination to which they were to be carried. Until that instrument was sent to them, they could make no arrangement for the transportation of the goods; and because they were not, for want of it, ready to be immediately transported, the defendants could only suffer the boxes to remain in the freight-house for the convenience and accommodation of the owner or consignor, until he or his agents should give them the information and directions which were indispensable to enable them to take any action in reference to the goods. In the mean time, from the very nature and provisions of the arrangement adopted by the two companies, the defendants necessarily held and had possession of the goods merely as warehousemen; for they could, under such circumstances, have charge of them only in their latter capacity. If the expense bill was delivered to them simultaneously with the delivery of the goods, or if afterwards and before the occurrence of the fire by which they were destroyed it had been duly delivered to any of their agents or servants, the goods would have been in condition for immediate transportation, and their liability as carriers would thereupon have at once attached. But before that was done.

their responsibility was of a different and more limited character. The instructions asked for ought, therefore, to have been given to the jury, who would thereby have been brought directly to the determination of the question in controversy between the parties, and respecting which the evidence was conflicting and contradictory. If, upon that evidence, the jury should find that the expense bill was delivered to the defendants before the fire occurred, they would have been liable as carriers, but otherwise as warehousemen only.

It is obvious that in the conduct of business of such magnitude, and in the care and transportation of the great number and variety of goods and packages which are continually passing from one railroad to another over any great line of travel and transportation, there must be some general and certain and well-understood arrangement between the proprietors of the connecting roads, to avoid inextricable confusion, and to enable the carriers to protect both their own rights and the rights of their customers. The arrangement which these two companies made, and which was fully proved at the trial, appears to have been a reasonable and necessary provision; and therefore it was one to which all parties were bound to conform; and consequently the defendants have a right to insist that their liability shall not be extended in any particular instance beyond the obligation which such conformity imposes upon them. For these reasons, their exceptions to the ruling of the court must be sustained, and a new trial ordered.

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RAILROAD COMPANY CEASES TO BE COMMON CARRIER AND BECOMES WAREHOUSEMAN, WHEN: See *Porter v. Chicago etc. R. R. Co.*, 71 Am. Dec. 286, note 290, where other cases are collected. The more stringent liability of a common carrier only attaches when the duty of immediate transportation arises: *Barron v. Eldredge*, 100 Mass. 458, citing the principal case. If any orders, directions, or instructions are to be given before the goods are to be forwarded, such liability does not attach: *Railroad Company v. Barrett*, 36 Ohio St. 452, also citing the principal case.

CONNECTING LINES OF CARRIERS OR RAILWAYS: See note to *Wells v. Thomas*, 72 Am. Dec. 230-247, where this subject is discussed at length; *Illinois Cent. R. R. Co. v. Copeland*, 76 Id. 749, note 754, where other cases are collected. A carrier who takes goods from a consignor upon an agreement to transport them over his own line and deliver them to the next line acts as a carrier and forwarding agent: *Darling v. Boston & W. R. R. Corporation*, 11 Allen, 297, citing the principal case. A corporation established for the transportation of goods for hire between certain points, and receiving goods directed to a more distant place, is not responsible beyond the end of its own line as a common carrier, but only as a forwarder: *Burroughs v. Norwich & W. R. R. Co.*, 100 Mass. 27, citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED IN *Rice v. Hart*, 118 Mass. 208.

## POND v. GIBSON.

[5 ALLEN, 19.]

ON PLEA OF STATUTE OF LIMITATIONS, IN ACTIONS FOR SLANDER, BURDEN IS ON PLAINTIFF to show that the cause of action accrued within the statutory period, prior to commencement of the action.

SLANDER. Defendant pleaded the statute of limitations. The court, upon this issue, instructed the jury that the burden was upon the plaintiff to prove that the defamatory words were spoken within two years before the commencement of the action. Verdict for defendant. Plaintiff alleged exceptions.

*P. C. Bacon and A. Norcross*, for the plaintiff.

*N. Wood*, for the defendant.

By Court, DEWEY, J. The general statement, so often found in the books, that the party who alleges the affirmative of any proposition shall prove it, will not much aid us in the present inquiry. The point will often arise, who has the affirmative. In examining this question, it might be supposed that the form, in pleading the statute of limitations, of closing the plea with a verification would seem to imply an allegation of some fact to be sustained by the party thus pleading. Such form of conclusion has been the more usual one. In *Lawes on Pleading*, 738, it is stated that the plea of the statute of limitations must be concluded with a verification. But it is now at least questionable whether such a conclusion is necessary. In *Bodenham v. Hill*, 7 Mees. & W. 274, where, to a plea of the statute of limitations, a demurrer was filed, assigning as a cause of demurrer that it did not conclude with a verification, the court held such form of conclusion to be quite unnecessary, Parke, B., saying: "The good sense of the matter is, that a party should not be required to verify that which it does not lie upon him to prove." In 2 Greenl. Ev., sec. 431, the rule as to the burden of proof is thus stated: "Where the statute of limitations is set up in bar of a right of action by the plea of *actio non accrevit infra sex annos*, which is traversed, the burden of proof is on the plaintiff to show both a cause of action and the suing out of process within the period mentioned in the statute." In accordance with this is 2 Stark. Ev., 4th Am. ed., 887. The case of *Hurst v. Parker*, 1 Barn. & Ald. 92, which was an action of trespass, to which the statute of limitations was pleaded, sustains the same view



of this question. Lord Ellenborough says: "The only question is, On whom is the issue? Now, the affirmative of the issue is on the plaintiff, who says that the cause of action did accrue within six years." In *Huston v. McPherson*, 8 Blackf. 562, which was a case arising upon a plea of the statute of limitations in an action of slander, the court held the burden of proof was upon the plaintiff.

The case of *Emmons v. Hayward*, 11 Cush. 48, is cited and relied upon as sustaining a contrary doctrine. If it does so, it is merely incidental, as no question of the burden of proof was raised or discussed. It merely affirmed the proposition that a defendant, by filing an admission of all the facts necessary to be proved by the plaintiff in his opening on the general issue, in order to obtain the right to open and close under the forty-first rule of the court of common pleas, was not thereby estopped from setting up in defense the statute of limitations. The action was *assumpsit* upon a special contract for the payment of money. The court, in assigning the reasons for their decision, assume the statute of limitations to be a matter strictly in avoidance, and that the special matter of defense under that plea is to be made out by the defendant. But the question we are now considering does not appear to have been in the mind of the court, nor was any question directly raised and discussed as to the burden of proof upon the statute of limitations.

The decision was correct in reference to the question there raised, but erroneous in some of the positions as stated in the opinion given. Upon full consideration of the question in its broader aspect, as now presented, we find the weight of authority strongly in favor of the ruling adopted at the trial, that the burden in the present case was on the plaintiff to show that the cause of action did accrue within two years next before the suing out of his writ.

Exceptions overruled.

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BURDEN OF PROOF ON PLEA OF STATUTE OF LIMITATIONS. — It is said by several text-writers that where the statute of limitations is set up in bar of a right of action, by a plea which is traversed, the burden of proof is on the plaintiff to show the commencement of the action within the statutory period: Abbott's Trial Evidence, 823; 2 Greenl. Ev., 14th ed., sec. 431. And this statement is supported unqualifiedly by some of the earlier cases: *Hurst v. Parker*, 1 Barn. & Ald. 92; S. C., 2 Chit. 249; *Wilby v. Henman*, 7 Tyrw. 957; S. C., 2 Crompt. & M. 658; *Lawrence v. Bridleman*, 3 Yerg. 496; *Prigmore v. E. T. V. & Ga. R. R.*, 1 Lea, 204; *Taylor v. Spears*, 44 Am. Dec. 519. The court in the last case said (though the matter was not essential to the

decision) that the burden of proof on an issue of the statute of limitations rests on the plaintiff; and an instruction that the plea of the statute of limitations is an affirmative plea on the part of the defendant, and that in order to avail himself of it he must introduce proof to sustain it, is erroneous. In *Lawrence v. Bridleman*, 3 Yerg. 496, in an action of detinue for a slave, the lower court instructed the jury to the same effect. Plaintiff had proved his title to the slave, and defendant's possession. Defendant did not introduce any evidence to show his possession of the slave for the period required by the statute, to confer title by adverse possession. It was therefore believed that the defendant had not proved himself within the protection of the statute, even if it would apply. But the judge told the jury that the statute of limitations would be a bar to the plaintiff, if he, plaintiff, had not proved himself to be in possession within three years before the institution of the suit, and the appellate court approved of the instruction. In *Huston v. McPherson*, 8 Blackf. 562, it is held that if to a plea of the statute of limitations, in slander, the plaintiff replied that the words were spoken within the statutory period, he must prove such fact.

Different or limited rules are found in other and later cases. In the note to sec. 431, 2 Greenl. Ev., 14th ed., it is said that the statute is to be regarded as a defense to be set up by plea, the burden of proof to establish which plea is on the defendant, but that in doing so he may use the allegations of the complaint as admissions of the plaintiff, and thus shift the burden to the plaintiff of proving some exception. So it is held that the person relying on the statute of limitations must show the facts which put it in motion: *Davenport v. Wynne*, 44 Am. Dec. 70; and where this is done, it is said that the burden is on the plaintiff, or party against whom the statute is pleaded, to disprove the plea of the statute, or show facts which take the case out of its operation: *Phillips v. Holman*, 26 Tex. 276. Similar to these are the rulings of courts to the effect that if the bar of the statute *prima facie* exists,—i. e., if it appears from the face of the complaint, or upon the trial on introduction of plaintiff's evidence,—the burden is then on the plaintiff to prove whatever he may rely on to take the case out of the operation of the statute: *Capes v. Woodrow*, 51 Vt. 106; *Cook v. Cook*, 10 Heisk. 466; *Apperson v. Pattison*, 11 Lea, 484; *Spuryer v. Hardy*, 4 Mo. App. 573.

The more reasonable rule would seem to be that which requires the defendant to first establish his plea that the action is barred, in whatever manner he may, before calling upon the plaintiff to prove that the action is not barred: *Duggan v. Cole*, 2 Tex. 381.

It is a settled rule, however, that one claiming the benefit of exceptions in a statute of limitations must bring himself within them by proof: *Somerville v. Hamilton*, 4 Wheat. 230; *Howell v. Hair*, 15 Ala. 194. Thus where infancy was pleaded, as operating to suspend the running of the statute: *Yell v. Lane*, 41 Ark. 43; *Vail v. Halton*, 14 Ind. 344; or that the party was a *feme covert*: *Dessaunier v. Murphy*, 33 Mo. 184; *Edwards v. University*, 1 Dev. & B. Eq. 325; or absence from the state: *Phillips v. Holman*, 26 Tex. 276,—it was held that the party setting up such disabilities against the bar of the statute must prove them. Likewise it is held that the burden is upon the party who relies upon other facts to remove the bar of the statute, such as part payment: *Knight v. Clements*, 45 Ala. 89; a new promise: *Moore v. Lessor*, 18 Id. 606; *White v. Campbell*, 25 Mich. 463; fraudulent concealment: *Spuryer v. Hardy*, 4 Mo. App. 573; *Baldwin v. Martin*, 3 Jones & S. 85; *Godbold v. Lambert*, 8 Rich. Eq. 155. A party claiming to have acquired title by the bar of the statute of limitations must prove the bar as against one who claims

under an otherwise valid title: *Stewart v. Cheatham*, 3 Yerg. 60; *Hood v. Hood*, 2 Grant Cas. 229; *Richardson v. Williamson*, 24 Cal. 289; *Greer v. Perkins*, 5 Humph. 588; overruling, in effect, *Lawrence v. Bridleman*, 3 Yerg. 496, cited above.

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## STONE v. DICKINSON.

[5 ALLEN, 29.]

**LIABILITY IS THAT OF JOINT TRESPASSERS** where several different creditors, acting separately, without concert, and even without knowledge that they are employing a common agent, cause their debtor to be arrested on their several writs, by the same officer, who serves the writs simultaneously, and by virtue thereof the debtor is committed to jail, where he is confined upon all of such writs at the same time; and full satisfaction by the debtor, obtained from any one of such persons, is a bar to an action by him against the others.

**ACTION** for damages for false imprisonment. The opinion states the facts.

*E. B. Stoddard and T. L. Nelson*, for the defendant.

*H. D. Stone*, pro se.

By Court, BIGELOW, C. J. Several questions were raised at the trial of this case, upon which it seems to be unnecessary to express an opinion, inasmuch as we are satisfied that, on the facts offered to be proved, the defendant established a good defense to the action, and that the jury should have been instructed accordingly. There can be no doubt of the rule of law that co-trespassers are jointly, as well as severally, liable for the damages occasioned by their wrongful acts; and as a consequence of this, that a release to one joint trespasser, or satisfaction from him for the injury, discharges all: *Brown v. Cambridge*, 3 Allen, 474, and cases cited. This principle is applicable to the case at bar. In the opinion of the court, the several persons on whose writs and by whose order the plaintiff was committed to jail, and held in confinement from June, 1858, to February, 1860, must be regarded in law as co-trespassers. Evidence was offered at the trial to prove that he had received satisfaction from some of them for his alleged wrong, and had given to them, in writing, a discharge for the damages he had suffered by reason of his arrest and false imprisonment. This satisfaction and discharge in legal effect operate as a release of the present cause of action against the defendant.

It cannot be denied that the parties who were plaintiffs in

the original actions, in suing out their writs against the present plaintiff, and causing him to be arrested and imprisoned, acted separately and independently of each other, and without any apparent concert among themselves. As a matter of first impression, it might seem that the legal inference from this fact is, that the plaintiff might hold each of them liable for his tortious act, but that they could not be regarded as co-trespassers, in the absence of proof of any intention to act together, or of knowledge that they were engaged in a common enterprise or undertaking. But a careful consideration of the nature of the action, and of the injury done to the plaintiff, for which he seeks redress in damages, will disclose the fallacy of this view of the case. The plaintiff alleges in his declaration that he has been unlawfully arrested and imprisoned. This is the wrong which constitutes the gist of the action, and for which he is entitled to an indemnity. But it is only one wrong, for which, in law, he can receive but one compensation. He has not in fact suffered nine separate arrests, or undergone nine separate terms of imprisonment. The writs against him were all served simultaneously by the same officer, acting for all the creditors, and the confinement was enforced by the jailer on all the processes contemporaneously, during the entire period of his imprisonment. The alleged trespasses on the person of the plaintiff were therefore simultaneous and contemporaneous acts, committed on him by the same person acting at the same time for each and all of the plaintiffs in the nine writs upon which he was arrested and imprisoned. It is, then, the common case of a wrongful and unlawful act, committed by a common agent acting for several and distinct principals.

It does not in any way change or affect the injury done to the plaintiff, or enhance in any degree the damages which he has suffered, that the immediate trespassers, by whom the tortious act was done, were the agents of several different plaintiffs, who, without preconcert, had sued out separate writs against him. The measure of his indemnity cannot be made to depend on the number of principals, who employed the officers to arrest and imprison him. We know of no rule of law by which a single act of trespass, committed by an agent, can be multiplied by the number of principals who procured it to be done, so as to entitle the party injured to a compensation, graduated, not according to the damages actually sustained, but by the number of persons through whose in-

strumentality the injury was inflicted. The error of the plaintiff consists in supposing that the several parties who sued out writs against him, and caused him to be arrested and imprisoned, cannot be regarded as co-trespassers, because it does not appear that they acted in concert, or knowingly employed a common agent. Such preconcert or knowledge is not essential to the commission of a joint trespass. It is the fact that they all united in the wrongful act or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the person injured. Whether the act was done by the procurement of one person or of many, and if by many, whether they acted with a common purpose and design in which they all shared, or from separate and distinct motives, and without any knowledge of the intentions of each other, the nature of the injury is not in any degree changed, or the damages increased which the party injured has a right to recover. He may, it is true, have a good cause of action against several persons for the same wrongful act, and a right to recover damages against each and all therefor, with a privilege of electing to take his satisfaction *de melioribus damnis*. But there is no rule of law by which he can claim to convert a joint into a several trespass, or to recover more than one satisfaction for his damages, when it appears that he has suffered the consequences of a single tortious act only. Take an illustration. Suppose that several persons have a grudge or spite against the same individual, but that neither of them is aware of the existence of this feeling in the others; and that each of them, for the purpose of gratifying his malice, without concert or co-operation with any one, and in ignorance of a similar intent on the part of others, employs the same person—a hired pugilist or bully—to inflict on the common object of their ill-will a severe personal castigation.

In such a case, no one would doubt that all the persons who incited to the commission of the assault and battery would be regarded as co-trespassers. They each and all would be responsible for procuring the act to be done. They would be severally as well as jointly liable to an action in favor of the party injured. But no one would contend that he could recover satisfaction from each of the persons liable to an action. When the damages suffered by him had been once paid by any one of those who procured the commission of the trespass, he could not claim to recover them again from each of the others. The law will not permit a party to receive any.

thing more than a compensation 'for an injury. Where there has been only one wrongful act, there can be but one full and complete indemnity. When that is obtained, the party injured has exhausted his remedy. Another illustration, more analogous to the case at bar, will serve to show the soundness of this conclusion. If, instead of the arrest and imprisonment of which the plaintiff complains, the nine writs against him had been served simultaneously by the same officer, by making an attachment of personal property belonging to him,—his house, for example,—in such case it could not be doubted that if for any reason the attachments were irregular and void, the plaintiff would be entitled to recover and to receive from one or all of the parties by whose order the attachments were made the full value of his horse. But it is equally clear that he could not rightfully claim to receive this sum in damages from each of them, or nine times the value of the animal. And yet such would be the result, if the attaching creditors are not to be regarded as co-trespassers. Nor is this the only absurd result which would follow from such a doctrine. If each attachment or each arrest and imprisonment on the several writs is to be deemed as a distinct trespass, for which the creditors are separately and not jointly liable in like manner as if made on one writ only, without any reference to those which were served simultaneously, we can see no reason why the officer might not be held liable to pay to the plaintiff damages as many times as there were writs served by him. He certainly must be regarded as a joint trespasser with each creditor whose writ he served; and if the service of each writ constituted a distinct trespass, for which the party injured might receive separate damages from each creditor, then the officer would also be subject to a like liability.

These views have led us to the conclusion that the evidence offered at the trial by the defendant to show that the plaintiff had received full satisfaction for the arrest and false imprisonment to which he had been subjected, and for which he claimed damages in his action from some of his creditors by whose order he was committed to jail, ought to have been admitted, and that the jury should thereupon have been instructed that the plaintiff could not maintain this action.

Exceptions sustained.

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LIABILITY OF CO-TRESPASSERS GENERALLY: See exhaustive note to *Kirkwood v. Miller*, 73 Am. Dec. 137-149, and see particularly page 143, citing the principal case, and other decisions on similar points. In *Werner v. Ed-*

union, 24 Kan. 153, *Boston and Albany R. R. v. Shanley*, 107 Mass. 579, and *Bryant v. Bigelow Carpet Co.*, 131 Id. 503, the principal case is cited to the point that co-trespassers are jointly and severally liable for the whole damage caused by the trespass. A release of one co-trespasser operates as a release of all: *Stone v. Dickinson*, 7 Allen, 28 (the same case as the principal case on a different appeal); *Stevens v. Hathorne*, 12 Id. 403; *Ellis v. Eason*, 50 Wm. 149, all citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Boyd v. Watt*, 29 Ohio St. 279, in the dissenting opinion of Ashburn, J., where it is said that if, under circumstances like those in the principal case, the writs had been served at different intervals in the course of the day, the trespasses would have been several, and each of the tort-feasors liable separately.

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## DANIELS v. HAYWARD.

[5 ALLEN, 43.]

STATUTE EXEMPTING DEBTOR'S TOOLS AND IMPLEMENTS TO VALUE OF ONE HUNDRED DOLLARS EMBRACES MACHINES of simple construction, moved by hand or foot, and used in the manufacture of boots; and this, although the machines are generally used by men whom the owner employs in his business.

ACTION against a sheriff for damages for conversion in attaching machines used in the manufacture of boots, and claimed by plaintiff to be exempt. The court instructed the jury that under the Massachusetts statute exempting from attachment a debtor's tools and implements to the value of one hundred dollars, the debtor, a boot-maker, carrying on a small business, and employing a number of men therein, working more or less himself, but being generally engaged in superintending his workmen, would have a right to claim as exempt not only his tools, but also machines of a simple construction. Verdict for plaintiff. Defendant alleged exceptions.

*P. C. Bacon and G. G. Parker*, for the defendant.

*T. G. Kent and H. B. Staples*, for the plaintiff.

By Court, DEWEY, J. The court properly instructed the jury as to the effect of General Statutes, c. 133, sec. 32, exempting certain articles from levy on execution. While the exemption was not intended to apply to large manufacturing establishments, it has not been supposed to be at variance with the letter or the spirit of the statute to apply it to the case of a mechanic carrying on a small business, although he may have in his employment men who perform the principal part of the labor with the tools, implements, and fixtures. The limita-



tions as to exemptions of this character were carefully stated by the court, and properly applied to the case. This view of the statute seems well authorized by the cases of *Pierce v. Gray*, 7 Gray, 67, and *Dowling v. Clark*, 1 Allen, 283; S. C., 8 Id. 570.

Exceptions overruled.

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**EXEMPTION OF TOOLS AND IMPLEMENTS OF TRADE FROM ATTACHMENT:** See the note to *Kilburn v. Deming*, 21 Am. Dec. 545-554; and see *Goddard v. Chaffee*, 79 Id. 796, this being a case decided under the same statute as that construed in the principal case. In *Wallace v. Bartlett*, 108 Mass. 54, the principal case is cited, and the court, considering a similar statute, says that it is intended for the protection of mechanics, artisans, handicraftsmen, and others, whose manual labor and skill afford them a means of earning their livelihood.

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## PIERCE v. LAMSON.

[5 ALLEN, 60.]

**EQUITY HAS JURISDICTION TO COMPEL DELIVERY AND SURRENDER OF DEED** of mortgage, which, after having been executed and delivered, though not acknowledged, has been intrusted to the mortgagor for the purpose of having it recorded, if he thereupon retains it in his own possession and refuses to deliver it up or have it recorded.

BILL in equity to compel defendant to deliver up and have recorded a deed of mortgage, which, after having been duly executed and delivered by him to complainant, was returned and intrusted to him for the purpose of having it recorded, which, after he obtained possession of the instrument, he refused to do.

*P. C. Bacon*, for the defendant.

*E. Mellen and W. S. Davis*, for the plaintiff.

By Court, BIGELOW, C. J. The bill avers with sufficient precision and certainty that the deed of mortgage was duly executed and delivered by the defendant to the plaintiff, so as to vest the title in the latter as between themselves. The acknowledgment was not essential to its validity as a deed by which the estate would pass presently to the grantee: *Dole v. Thurlow*, 12 Met. 157, 162; *Howard Mutual Loan and Fund Association v. McIntyre*, 3 Allen, 572. This averment of delivery, coupled with the other statements of the bill, is sufficient

to show that the plaintiff is entitled to the possession of the deed.

The only other question raised by the demurrer is, whether the court has jurisdiction in equity of the case. Before the enlargement of our chancery jurisdiction, it would seem to be quite clear that, without an averment that the deed was withheld or secreted so that it could not be replevied, the party entitled to its possession could not have maintained a bill in equity for its recovery: *Travis v. Tyler*, 7 Gray, 146. But under the provision contained in General Statutes, chapter 113, section 2, by which full jurisdiction, according to the course and practice of courts of chancery, where there is not a plain, adequate, and complete remedy at law, is conferred on this court, we have no doubt that the case stated in the bill is one which entitles the plaintiff to relief in equity. One of the most ancient heads of chancery jurisdiction is that which gives specific relief to persons having a right to the possession of deeds and other written instruments, by a decree for their surrender and delivery by those who wrongfully detain and withhold them: Story's Eq., sec. 703, 906; *Knye v. Moore*, 1 Sim. & St. 61; *Freeman v. Fairlie*, 3 Mer. 30. The remedy at law is inadequate in the present case, because it furnishes no means by which the plaintiff in one suit can recover his deed and at the same time restrain the defendant, in whom the apparent title to the premises described in the deed stands on the record, from conveying the premises to an innocent purchaser without actual notice of the previous deed to the plaintiff, and thus depriving the plaintiff of the estate to which he is entitled.

Demurrer overruled.

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THE PRINCIPAL CASE IS CITED IN *Wall v. Hickey*, 112 Mass. 174, and *Hinckley v. Greany*, 118 Id. 598, to the point that equity will interfere to relieve against a cloud on title, resulting from fraud, if there be no adequate remedy at law. To the same effect see the principal case cited in *Couston v. Shearer*, 99 Id. 211, where it was held that the court could compel the surrender of a mortgage fraudulently obtained; and in *Brigham v. Home Ins. Co.*, 131 Id. 321, where the court compelled the surrender of an insurance policy which was fraudulently withheld.

## SYLVESTER v. SWAN.

[5 ALLEN, 134.]

**SALE, BY AGENT EMPLOYED THEREFOR, FOR LESS THAN ITS FACE, OF PRINCIPAL'S NOTE, payable to his own order and indorsed by him, is usurious, although the purchaser supposes that he is merely purchasing the note in the market, and does not know that the seller is acting only as an agent.**

**ACTION of contract.** Defendant having made his note, payable to and indorsed by himself, employed one Wheeler to sell it, which he did for fifty dollars less than the face of the note, to one Southworth, who had no notice that Wheeler was acting as defendant's broker or agent. Southworth sold to Swan, who also took without notice of Wheeler's part in the sale, and sued in this action for the amount of the note. Usury was set up as a defense. Verdict was rendered for plaintiff. Defendant appealed.

*C. G. Davis*, for the defendant.

*J. White*, for the plaintiff.

By Court, BIGELOW, C. J. The transaction proved at the trial, by which the note in suit was negotiated to the person who received it as the first holder for value, was in legal effect equivalent to a delivery of the note by the promisor directly from his own hands, in consideration of the money advanced to him therefor. It was a loan of money to the defendant on the note. The fact that the money was obtained through an agent of the defendant does not in any degree change or affect the legal character which attaches to the dealings of the parties. Until the note was negotiated by the defendant's agent, it did not become a binding and operative contract, upon which the promisor could be held liable. It was the delivery of the note to the first holder, in consideration of the money which he lent upon it, which made the defendant for the first time chargeable on his promise. It was not, therefore, in any sense a purchase of a note in the market which had been previously put in circulation. It did not on its face purport to have been in the hands of a third person. Being payable to the order of the maker, it was negotiable by delivery only, and in effect was payable to bearer. In this respect it differed from an accommodation note, bearing the indorsement of a payee, which might mislead an innocent purchaser, because it would appear to have been passed from the promisor to a third person as a

valid contract for a valuable consideration, and he might well suppose that he was buying a note at a discount from a person who was neither a party to it nor an agent of the original parties to the promise. But in the case at bar there was nothing to show that the note had ever been passed from the promisor, or put into circulation by him, when the money was advanced upon it to the defendant's agent. It is not, therefore, made to appear that any deception or fraud was practiced in the negotiation of the note, or that by the use of due diligence and by proper inquiry the person who first advanced money on the note might not have ascertained the real nature of the transaction. Under such circumstances, it cannot be said that there was no loan of money on the note at a usurious rate of interest, unless we are prepared to affirm the proposition that an advance of money to a promisor on his note through his servant or agent, at a greater rate of interest than is allowed by law, does not constitute usury. Such a doctrine would be inconsistent with first principles, and contrary to the well-settled course of judicial decisions: *Munn v. Commission Co.*, 15 Johns. 44 [8 Am. Dec. 219]; *Powell v. Waters*, 8 Cow. 669; *Dowe v. Schutt*, 2 Denio, 621; *Churchill v. Suter*, 4 Mass. 156; *Knights v. Putnam*, 3 Pick. 184, 186; *Van Schaack v. Stafford*, 12 Id. 565.

The argument in behalf of the plaintiff goes upon the ground that there can be no usury where there is no intention on the part of the lender of money to take a greater rate of interest than is allowed by law. But this is a mistake. Usury does not consist in the intent with which parties take or pay unlawful interest. It is the transaction to which the law looks, in order to ascertain whether it is usurious or otherwise. The prohibition of the statute embraces every contract or assurance for the payment of money with interest at a greater rate than is allowed by law, irrespective of the motive or intent of the parties in making it. Whatever form or disguise the dealing of the parties may assume, it will be deemed usurious if in effect it is a loan of money at an unlawful rate of interest. Thus it has been held that where a greater rate than legal interest was reserved on a contract without any intention by the lender to receive usurious interest, but under a mistaken supposition of a legal right to make a deduction from the sum lent, it was nevertheless a usurious contract under the statute, and for that reason void: *Maine Bank v. Butts*, 9 Mass. 49, 55.

Exceptions sustained.

**WHAT CONTRACTS ARE USURIOUS.** — This subject is fully covered by the note to *Davis v. Garr*, 55 Am. Dec. 391-400; and the purpose here is merely to collect the subsequent cases.

Interest, lawful where a contract is made and is to be enforced, is allowable, though exceeding the rate allowed at the place fixed for payment: *Parcoast v. Traveler's Ins. Co.*, 79 Ind. 172; *Sheldon v. Haxton*, 91 N. Y. 124. But the usurious quality of a note made in one state and transmitted for discount to another must be determined by the usury laws of the latter state: *Providence Bank v. Frost*, 14 Blatchf. 223. A note given after the abolition of usury laws, for money actually lent at a rate of interest usurious at the time it was borrowed, is valid: *Houser v. Planters' Bank*, 57 Ga. 95.

Where a transaction, whatever its form, is in fact a usurious lending of money, the transaction is a usurious one, and will be dealt with as such by the courts: *Smith v. Cross*, 90 N. Y. 549. Transactions authorized by the state legislature are excepted from the operation of statutes against usury: *Montgomery Mutual Ben. Ass'n v. Robinson*, 69 Ala. 413.

In Wisconsin, an agreement to compound interest is held not to be usurious: *Case v. Fish*, 58 Wis. 56. An agreement to pay interest on overdue interest is held not to be usurious, though in a state where compound interest is considered usurious: *Hager v. Blake*, 16 Neb. 12; *Craig v. McCullough*, 20 W. Va. 148; but an agreement to pay compound interest on overdue interest has been held usurious: *Stansbury v. Stansbury*, 24 Id. 634. But a note executed with an agreement that at some subsequent time a new agreement for an amount equivalent to usurious interest should be executed is itself usurious: *Cousins v. Gray*, 60 Tex. 346; *Smith v. Hathorn*, 88 N. Y. 211. There is held to be no usury in a contract in good faith for the loan of money upon collateral security, with an agreement that in case the lender was compelled to sell the collateral he should be entitled to a percentage commission on the sale: *Righter v. Phila. W. Co.*, 99 Pa. St. 289.

A bonus paid to a guardian as an inducement to him to loan the money of his ward is held not usury: *Fellows v. Longyor*, 91 N. Y. 324. And in *Phillips v. MacKellar*, 92 Id. 34, and *Jordan v. Humphrey*, 31 Minn. 495, it is held that a loan is not usurious because an agent exacted more than the legal interest, if done without his principal's knowledge; but in *New England M. S. Co. v. Hendrickson*, 13 Neb. 157, it is held that in such a case the principal, to relieve the contract of the taint of usury, must prove that the agent acted as he did without his, the principal's, knowledge or authority.

The sale of school bonds for less than their face will not constitute usury, unless the sale is intentionally so made to avoid the usury laws: *Orchard v. School District*, 14 Neb. 378. A contract to purchase the maker's note from him for less than its face is usurious: *Zabriskie v. Spielman*, 46 N. J. L. 35. But a contract whereby one sells another's note, which he owns, for less than its face is not void for usury: *Corning v. Pond*, 29 Hun, 129; *Capital City v. Quinn*, 73 Ala. 558. So a maker may sell his own notes through a broker for less than their face, and the sale is not usurious as to the purchaser who does not know the broker's capacity in the bargain: *Moseley v. Brown*, 76 Va. 419; *Ayer v. Tilden*, 77 Am. Dec. 356, and note. But see *contra*, under a special statute, *North Bridgewater Bank v. Copeland*, 7 Allen, 139; *Whitten v. Hayden*, Id. 407; *Richardson v. Brackett*, 101 Mass. 504, all citing the principal case. A note given in lieu of others, one of which has not expired, is not usurious because no allowance was made for the fact that such note had not fully run: *Keckley v. Union Bank*, 79 Va. 458.

The exaction of interest for an agreement to forbear is usurious: *Shirley v.*

*Welby*, 71 Am. Dec. 244; *Moseley v. Brown*, 76 Va. 419; *Leonard v. Patton*, 106 Ill. 99; *Meers v. Stevens*, Id. 549. An agreement to pay a sum certain, and another sum which is more than the legal interest, if the debt be not punctually paid, has been held not usurious: *Gower v. Carter*, 66 Am. Dec. 71; *Rogers v. Sample*, 69 Id. 349; *Weyrich v. Hobelman*, 14 Neb. 432.

An agreement to take an insurance policy, pay the premiums thereon, and in addition pay the highest rate of legal interest on money lent on such policy, is usurious: *Missouri V. Ins. Co. v. Kittle*, 1 McCrary, 234. Contracts by loan associations for loans to their members, at rates above the legal interest, are usurious: *Bates v. People's Sav. Bank*, 42 Ohio St. 655; *Columbia B. & L. Ass'n v. Bollinger*, 78 Am. Dec. 463; but payment of an additional bonus for the first privilege of borrowing, and the like, do not make the contract usurious: *West Winsted S. & L. Ass'n v. Ford*, 71 Id. 66; *Massey v. Building Ass'n*, 22 Kan. 625; *Holmes v. Smythe*, 100 Ill. 413. As to usury in contracts of building and loan associations, see *Delano v. Wild*, 83 Am. Dec.

Condition to loan of money that the borrower shall buy a piece of land from the lender, at an exorbitant price, is evidence of usury: *Earnest v. Hoskins*, 100 Pa. St. 551. A gross difference between the amount of a note and mortgage and the amount of money which the mortgagor receives therefor will render the mortgage void as being usurious: *Cattle v. Haddock*, 14 Neb. 527. The fact that the mortgagor's agent in procuring the loan gets a large commission from the mortgagor, does not taint with usury the transaction between the mortgagor and mortgagee: *Fisher v. Porter*, 23 Fed. Rep. 162. The allowance of an additional amount above the legal interest, for expense in examining the title, and the like, will not invalidate a note and mortgage: *Comstock v. Wilder*, 61 Iowa, 274. So an additional sum paid for care of premises will not affect the validity of the transaction: *Case v. Fish*, 58 Wis. 56. The fact that the lender falsely represented an additional sum as part of the expense of getting the money, and collected the same from the borrower without the latter's knowledge of the falsity of the representation, will not render the loan void for usury, for the transaction would fail to show a mutual agreement to evade the usury laws: *Siewert v. Hamel*, 91 N. Y. 99; *Morton v. Thurber*, 85 Id. 550; *Guggenheimer v. Geiszler*, 81 Id. 293.

Payment of a usurious debt by a sale of land does not render the sale void for usury: *Hicks v. Marshall*, 67 Ga. 713; *Matlock v. Cobb*, 62 Miss. 43. An agreement to pay usurious interest or to pay any taxes that may be exacted is not usurious, as it is in the alternative: *Home Ins. Co. v. Dunham*, 33 Hun, 415.

A note executed to secure a loan of gold at a higher rate than the market value of gold, in addition to legal interest, is usurious: *Austin v. Walker*, 45 Iowa, 527. A custom of stock-brokers to debit and credit interest monthly, computing interest on balances, does not necessarily involve usury because providing for possible compound interest, for the balances may be paid: *Hatch v. Douglass*, 48 Conn. 116.

Sharing profits by a lender in an adventure to an extent greater than the legal rate of interest does not make the transaction usurious, if he at the same time shares the losses: *Goodrich v. Rogers*, 101 Ill. 523. Where partners agree to pay a rate in excess of legal interest on their over-drafts during the continuance of the firm, the transaction is not usurious, but merely that a partner withdrawing firm funds shall contribute to profits an amount equal to the estimated earning power of the capital withdrawn: *Payne v. Freer*, 91 N. Y. 43.

A bond given to secure a judgment on confession of judgment in an action

on usurious notes is held to be tainted with usury: *Moses v. McDuff*, 88 N. Y. 62. An assignor who has made specific provision for the payment of a certain debt in an assignment cannot defeat its terms because such debt was usurious: *Chapin v. Thompson*, 89 Id. 270. If a usurious contract is abandoned and securities canceled, a subsequent promise by the borrower to pay the sum actually loaned is for a good consideration, not tainted with usury, and enforceable: *Sheldon v. Harten*, 91 Id. 124.

## "THE COUNT JOANNES" v. BENNETT.

[5 ALLEN, 169.]

IT IS NO JUSTIFICATION FOR WRITING LIBELOUS LETTER TO WOMAN concerning her suitor, that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to its contents.

WITNESS CANNOT TESTIFY TO CONTENTS OF WRITING VOLUNTARILY AND DELIBERATELY DESTROYED by himself in a suit brought by himself and founded upon the writing, unless he first introduces evidence to rebut the suspicion of fraud arising from his act.

TORT for libels upon plaintiff, contained in letters written by defendant to a woman to whom he was then a suitor, and was afterwards married, endeavoring to dissuade her from entering into the marriage. Defendant, by way of justification, introduced evidence to show that he was the woman's former pastor, and her intimate friend, and wrote the letters at the request of her parents, who assented to the contents.

*G. W. Warren*, for the defendant.

The plaintiff, *pro se*.

By Court, BIGELOW, C. J. The doctrine that the cause or occasion of a publication of defamatory matter may afford a sufficient justification in an action for damages has been stated in the form of a legal rule or canon, which has been sanctioned by high judicial authority. The statement is this: A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter, which without such privilege would be libelous and actionable. It would be difficult to state the result of judicial decisions on this subject, and of the principles on which they rest, in a more concise, accurate, and intelligible form: *Harrison v. Bush*, 5 El. & B. 344, 348; *Gassett v. Gilbert*, 6 Gray, 94, and cases cited. It seems to us



very clear that the defendant in the present case fails to show any facts or circumstances in his own relation to the parties, or in the motives or inducements by which he was led to write the letter set out in the first count of the declaration, which bring the publication within the first branch of this rule. He certainly had no interest of his own to serve or protect in making a communication concerning the character, occupation, and conduct of the plaintiff, containing defamatory or libelous matter. It does not appear that the proposed marriage, which the letter written by the defendant was intended to discountenance and prevent, could in any way interfere with or disturb his personal or social relations. It did not even involve any sacrifice of his feelings or injury to his affections. The person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred. It is not shown that he had any peculiar interest in her welfare. Under such circumstances, without indicating the state of facts which might afford a justification for the use of defamatory words, it is plain that the defendant held no such relation towards the parties as to give him any interest in the subject-matter to which his communication concerning the plaintiff related: *Todd v. Hawkins*, 2 Macl. & R. 20; S. C., 8 Car. & P. 88. No doubt he acted from laudable motives in writing it. But these do not of themselves afford a legal justification for holding up the character of a person to contempt and ridicule. Good intentions do not furnish a valid excuse for violating another's rights, or give impunity to those who cast unjust imputations on private character.

It is equally clear that defendant did not write and publish the alleged libelous communications in the exercise of any legal or moral duty. He stood in no such relation towards the parties as to confer on him a right, or impose on him an obligation, to write a letter containing calumnious statements concerning the plaintiff's character. Whatever may be the rule which would have been applicable under similar circumstances, while he retained his relation of religious teacher and pastor towards the person to whom this letter in question was addressed, and towards her parents, he certainly had no duty resting upon him after that relation had terminated. He then stood in no other attitude towards the parties than as a friend. His duty to render them a service was no greater or more obligatory than was his duty to refrain from uttering and publishing slanderous or libelous statements concerning another.

It is obvious that if such communications could be protected merely on the ground that the party making them held friendly relations with those to whom they were written or spoken, a wide door would be left open by which indiscriminate aspersion of private character could escape with impunity. Indeed, it would rarely be difficult for a party to shelter himself from the consequences of uttering or publishing a slander or libel under a privilege which could be readily made to embrace almost every species of communication. The law does not tolerate any such license of speech or pen. The duty of avoiding the use of defamatory words cannot be set aside except when it is essential to the protection of some substantial private interest, or to the discharge of some other paramount and urgent duty. It seems to us, therefore, that on the question of justification set up by the defendant, under a supposed privilege which authorized him to write the letter set out in the first count, the instructions of the court were correct.

But on another point raised at the trial, we are all of opinion that the ruling of the court was erroneous. In support of his second count, the plaintiff was permitted to testify concerning the contents of the alleged libel, after it had appeared that he had voluntarily destroyed the letter in which it was contained. This we think was a violation of the cardinal principle, that where it appears that a party has destroyed an instrument or document, the presumption arises that if it had been produced it would have been against his interest or in some essential particulars unfavorable to his claims under it. *Contra spoliatores omnia presumuntur*. In the absence of any proof that the destruction was the result of accident or mistake, or of other circumstances rebutting any fraudulent purpose or design, especially where as in the case at bar it appears that the paper was voluntarily and designedly burned by the party who relies on it in support of his action, the inference is that the purpose of the party in destroying it was fraudulent, and he is excluded from offering secondary evidence to prove the contents of the document which he has by his own act put out of existence. If such were not the rule, and a party could be permitted to testify to the language or purport of written papers which he had willfully destroyed, in support of his right of action against another, great opportunities would be afforded for the commission of the grossest frauds. A person who has willfully destroyed the higher and better evidence ought not to be

permitted to enjoy the benefit of the rule admitting secondary evidence. He must first rebut the inference of fraud which arises from the act of a voluntary destruction of a written paper, before he can ask to be relieved from the consequences of his act by introducing parol evidence to prove his case. Thus it has been held that when a note was burned by the holder a short time before it fell due, he was bound to show in an action upon the note that the act of destruction was honest and justifiable, or he could not recover; and even an alleged negligent destruction or loss of an instrument, unaccompanied by evidence or explanation to rebut the suspicion or inference of a fraudulent design, will not authorize secondary evidence of the contents of the instrument: *Blade v. Noland*, 12 Wend. 173 [27 Am. Dec. 126]. See also *Broadway v. Stiles*, 7 N. J. Eq. 58; *Riggs v. Tayloe*, 9 Wheat. 483, 487; *Renner v. Bank of Columbia*, Id. 581. This doctrine is especially applicable to actions for libel, in which the language used, and the sense and meaning which properly attach to it, constitute the gist of the action.

In the case at bar, the plaintiff offered no evidence to show the circumstances under which he destroyed the letter referred to in his second count. He was not, therefore, entitled to offer any proof to show the contents. On this ground the verdict is set aside, and a new trial granted.

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PARTY DESTROYING EVIDENCE THEREBY RAISES STRONG PRESUMPTION against himself as to the probable effect of such evidence: *Thompson v. Thompson*, 68 Am. Dec. 639, and note 648. This presumption, however, cannot be used to relieve the opposite party from the burden of proving his case: *Gage v. Parmelee*, 87 Ill. 343, citing the principal case. Parol evidence is not admissible of documents willfully destroyed or suppressed by the party offering the evidence, unless he first rebut the presumption of fraud from his act: *Rudolph v. Lane*, 57 Ind. 118; *Stone v. Sanborn*, 104 Mass. 324; *Gage v. Campbell*, 131 Id. 570; but if there was no fraud in the destruction of the documents, parol evidence is properly admitted: *Bowen v. Reed*, 103 Mass. 49, all citing the principal case.

COMMUNICATION IS NOT LIBEL WHERE MADE AT REQUEST of person standing *in loco parentis* to the person claiming to be libeled thereby: *Atoill v. Mackintosh*, 120 Mass. 177; but the mere fact that a communication is made with a laudable purpose is no justification in law for the act of a mere volunteer in publishing defamatory statements of another: *Shurtleff v. Parker*, 130 Mass. 298, both citing the principal case.

## SULLINGS v. RICHMOND.

[5 ALLEN, 187.]

**WIDOW'S RIGHT TO DISTRIBUTIVE SHARE OF HUSBAND'S PERSONAL ESTATE IS NOT BARRED** by an antenuptial agreement that she would accept certain provisions therein undertaken to be made for her by him, in place of and as a substitute for dower in his estate, and as a bar and estoppel to any and every other claim by her upon his estate.

**APPEAL** from order of probate judge disallowing the claim of petitioner, the widow of Hervey Sullings, deceased, to her distributive share in his personal estate. The antenuptial agreement between the husband and wife was set up as a bar to her claim. By such agreement, petitioner had consented to accept certain provisions therein, in place of and as a substitute for dower in her husband's estate, and as a bar and estoppel to any and every other claim by her upon his estate. This was held to be a bar to her right to a distributive share of the personalty.

*T. D. Eliot and T. M. Stetson*, for the petitioner.

*B. F. Thomas and W. W. Crapo*, for the respondents.

By Court, HOAR, J. It seems to be well settled that an antenuptial contract, which is not to be performed during the coverture, is not discharged by the marriage of the parties to it, even at law: *Milburn v. Ewart*, 5 Term Rep. 381; *Gibson v. Gibson*, 15 Mass. 111 [8 Am. Dec. 94]; *Miller v. Goodwin*, 8 Gray, 543.

We can have no doubt that, fairly construed, the agreement between the petitioner and her husband, made before marriage, was intended not only to bar her claim for dower, but for any distributive share of her husband's estate.

Such an agreement would be no bar to dower at common law, unless the covenants could operate by way of rebutter: *Hastings v. Dickinson*, 7 Mass. 153 [5 Am. Dec. 84]; *Gibson v. Gibson*, 15 Mass. 106 [8 Am. Dec. 94]. Whether it constitutes a bar to dower under the statute is not now before us for decision. It would undoubtedly have been effectual, if the terms of the contract had been performed.

But as an answer to the claim of the widow to a distributive share of the personal estate, there are difficulties which we think insuperable. If the covenant not to claim any part of the personal estate could be construed as a release, a release of a claim which has no present existence is inoperative. The

contract being executory cannot avail by way of estoppel. It could not be broken, so as to create any cause of action upon it, until after a decree of distribution should have been made.

It was said in *Gibson v. Gibson*, 15 Mass. 106 [8 Am. Dec. 94], that a covenant not to claim dower would be effectual by way of rebutter, to avoid circuitry of action, only if there were shown to be no inequality between the value of the dower and the sum for which the claimant would be answerable in damages for breach of the covenant.

But there is one broad distinction between the right of a married woman to dower and her right to a distributive share of personal estate. An inchoate right of dower is an encumbrance on land during the life of the husband, which affects his power of disposal; while personal estate is wholly subject to his control. As a question of damages to the husband or his administrator, it might be difficult to define the injury sustained by reason of one person rather than another becoming entitled to a share of personal estate not given by will. When the contract which we are considering was made, the right of a husband to dispose of his personal estate by will was wholly independent of the wife. The change in the statute law which has given to the wife the right to waive the provisions of her husband's will, and within certain limitations to take the same share of his estate as if he had died intestate, created a relation to his estate which did not exist at the date of the contract. As he made a will, the case at bar would not have arisen but for this statute; and the statute has made no provision as to the effect of marriage settlements or contracts.

The right of a person entitled to share in the personalty, under a decree of distribution of an intestate estate, is a peculiar one. It is not a right to any specific property of the intestate. It arises after the estate has been settled, and is not open to any set-off or other defense, arising from contracts with the decedent: *Hancock v. Hubbard*, 19 Pick. 167. The powers of the court of probate are for the most part defined and fixed by statutes, and do not extend to a general decision of controverted questions affecting the settlement of estates. It has no equity powers, except where they are conferred by statute; and its rules of property and evidence, with the like exception, are those which govern courts of common law: *Eveleth v. Crouch*, 15 Mass. 307; *Grinnell v. Baxter*, 17 Pick. 383.

It would be impossible to determine in advance, in many cases, who would be interested in the performance of a cove-

nant by a wife to claim no distributive share in her husband's estate at the time of the death, when the covenant would first become operative. The husband and wife might be of kin to each other; and before his death the wife might become his sole heir; or she might become the representative of those for whose benefit the contract was intended. Suppose, as an extreme case, that there were no kindred, would such a contract by the wife so far conclude her rights as to enable the commonwealth to claim by escheat? Or suppose an intestate to have bought out the right of all his nearest of kin, according to the statute of distributions, in his lifetime, what decree could be entered in the probate court? Could the judge of probate pass over all those whom the statute entitles to a decree of distribution, and look for the next more remote kindred? Or what would become of the estate?

It is noticeable that not a single case has been cited in which a contract of this kind has ever been held at law to bar the right of the wife. Yet a large number of cases have been cited in which courts of equity have recognized the validity of the contract, and enforced its performance. But equity proceeds upon the doctrine of enforcing a specific performance; in the application of which it is immaterial to whom the legal interest descends, because the contract raises a trust, of which the court can compel the execution. A court of equity can also determine whether the party seeking to enforce the trust is within the equity of the original contract: *Neves v. Scott*, 9 How. 196.

At law, a case somewhat analogous would be that of an agreement among heirs, upon a sufficient consideration, that one or more of them should relinquish his distributive share of an estate; or an express assignment of the share of one to another, or to a stranger. It would scarcely be suggested that such a contract would alter the power or the duty of the probate court in making a decree of distribution. In the case of *Trull v. Eastman*, 3 Met. 123 [37 Am. Dec. 126], it was, indeed, held that a conveyance by one heir to another of his expectant right in his father's estate, made on sufficient consideration, with the father's assent, by deed with covenants of warranty, was effectual to pass the real estate; the covenant operating by way of rebutter, and being a covenant that runs with the land. But it is obvious that the reasons for that decision would not apply to personalty.

Upon these considerations, the court are of opinion that Mrs.

Sullings is entitled to a decree in the probate court for the payment of her distributive share in her husband's estate, without reference to the antenuptial agreement set forth in the report, and that the remedy of any parties interested in the enforcement of that agreement is in equity.

Decree reversed.

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MARRIAGE SETTLEMENTS AND ANTENUPTIAL AGREEMENTS GENERALLY: See note to *Merritt v. Scott*, 50 Am. Dec. 371-375; and see *Houghton v. Houghton*, 77 Id. 69, and note. The principal case is cited to the point that in a proper case where equity requires it, a contract by which a woman, in contemplation of marriage, for a valuable consideration agrees to relinquish her distributive share of her intended husband's estate if she survives him, will be enforced specifically: *Sullings v. Sullings*, 9 Allen, 237; *Tarbell v. Tarbell*, 10 Id. 280; *Jenkins v. Holt*, 109 Id. 261; but the probate court is not the proper medium for relief in such cases: *Tarbell v. Tarbell*, 10 Id. 280; *Blackinton v. Blackinton*, 110 Mass. 462; *Mann v. Mann*, 53 Vt. 54, 55, 56, all citing the principal case.

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## HALL v. CROWLEY.

[5 ALLEN, 304.]

AGREEMENT IS TO BE CONSTRUED AS FIXING AMOUNT OF LIQUIDATED DAMAGES, AND NOT PENALTY, which provides that the contractor is to repair certain houses for the sum of fifteen hundred dollars, and have them completed, ready for occupancy, by December 1st, and that "for each and every day's delay in the completion of said houses after December 1st, said contractor is to forfeit five dollars."

ACTION of contract. Plaintiff agreed, for the sum of fifteen hundred dollars, to repair defendant's houses, and have them ready for occupancy by December 1st, and that "for each and every day's delay in the completion of said houses after December 1st, said Hall is to forfeit five dollars." After a delay of fifty-six days in the completion of the buildings, plaintiff sues in this action for the balance due him. The court ruled that the clause above provided for a penalty, and after reference, fixed defendant's damage by the delay at one hundred dollars, and gave plaintiff judgment for the balance of the contract price, except such sum. Defendant alleged exceptions.

A. Russ, for the defendant.

A. Cottrell, for the plaintiff.

By Court, BIGELOW, C. J. The principles on which courts of law proceed in determining whether a sum named in a con-



tract, to be paid in case of a failure to perform its stipulations, is to be treated as a penalty, or as liquidated damages, from which no deduction is to be made, have been very fully discussed and applied by this court in recent cases: *Chase v. Allen*, 13 Gray, 42; *Lynde v. Thompson*, 2 Allen, 456. According to those principles, there can be no doubt that the sum named in the contract declared on is to be treated as liquidated, and as fixing the exact measure of compensation to which the defendant should be entitled, in case the plaintiff did not complete his contract within the stipulated time. Such seems to us to have been the intention of the parties. The language of the contract, as applied to the subject-matter, is susceptible of no other reasonable interpretation. The sum agreed upon is a reasonable one, and such as the parties might well have fixed as a fair indemnity for a failure, substantially, to finish the houses within the period fixed by the contract. Besides, and this perhaps is the most decisive consideration, the sum named is for a breach of a contract for doing one certain and specific job of work within a prescribed time, and not for an omission to comply with divers separate and independent stipulations of different degrees of importance, and the failure to perform each of which would occasion very different and unequal amounts of damage to the defendant. Nor is it overlooked that the loss or injury which would accrue to the owner by the non-completion of the houses seasonably, according to the terms of the contract, would be difficult to prove, and still more difficult to estimate in money. All these circumstances indicate very clearly that the intent of the parties was to insert in their agreement a fixed measure of damages, and not to name a sum as a penalty merely: *Fletcher v. Dyche*, 2 Term Rep. 36; *Curtis v. Brewer*, 17 Pick. 513. In cases of this nature, where the intent of the parties is so clear, the use of the word "forfeit" in the clause providing for damages in case of a breach, is not regarded as of much weight: *Lynde v. Thompson*, 2 Allen, 456.

It was suggested by the counsel for the plaintiff, that as the contract contained various stipulations concerning the mode in which the work was to be done, if the clause in question was to be construed as an agreement for liquidated damages, a breach of the most unimportant of them would entitle the plaintiff to recover the agreed sum, although the loss or damage might be readily estimated in money, and be much less in amount than the amount named in the contract. If this were

so, it would, as already stated, be quite decisive that the parties did not intend any such result. But such is not the true construction of the contract. The damages agreed on by the parties are not to be paid in case of a breach of the particular stipulations in the contract concerning the mode of doing the work, but for a failure to finish the work substantially according to the contract by a specified time. If the work was thus done, although imperfectly finished, and in some respects not in conformity to the terms of the agreement, there would have been no breach of the clause in question, and no claim could have been maintained for liquidated damages.

Exceptions sustained.

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SUM WHETHER LIQUIDATED DAMAGES OR PENALTY: See *Bagley v. Peddie*, 69 Am. Dec. 713, and note; *Mason v. Callender*, 72 Id. 102.

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## STEWART v. LORING.

[5 ALLEN, 306.]

NO ACTION LIES ON AGREEMENT TO PAY FOR TUITION for a specified time, if during the whole of such time the promisor was prevented by illness from attending or receiving the tuition.

ACTION upon a contract as follows: "This is to certify that I promise to pay P. Stewart, Jr., the sum of ten dollars for tuition to the gymnasium, from September 1, 1859, to September 1, 1860. J. C. Loring." Defendant was prevented by reason of illness from attending or using the gymnasium, although the plaintiff kept it open and was ready to give defendant the instruction mentioned in the contract. Verdict for defendant. Plaintiff alleged exceptions.

A. Russ, for the plaintiff.

J. Nickerson, for the defendant.

By Court, DEWEY, J. The promise on the part of the defendant to pay the plaintiff the sum of ten dollars has, on the face of the written contract, no other consideration than the receiving of instruction by the defendant at the gymnasium. This instruction was not received, and so far the consideration for the promise has failed. But if we may suppose the real purpose of the writing to have been to insure the plaintiff in advance that his school should be patronized, and that the defendant would be a pupil, then the answer, as it seems to

us, might be reasonably made that the party, without any fault of his own, was from subsequent ill health rendered physically incapable of attending the gymnasium as a pupil. The parties must have acted upon the assumption of the continued ability of the promisee to give and the promisor to receive the proposed instruction.

The judgment was properly rendered for the defendant.

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### CODMAN v. EVANS.

[5 ALLEN, 303.]

**OWNER OF LAND MAY MAINTAIN ACTION AGAINST ADJOINING OWNER FOR ERRECTING BAY-WINDOW** so as to extend over his, plaintiff's land, although that portion of the land which is covered by the bay-window has been laid out and is used as a highway; and evidence of a custom to so erect bay-windows is inadmissible.

**TORT.** The opinion states the facts.

*G. O. Shattuck and G. Putnam, Jr.*, for the defendant.

*C. A. Welch and W. S. Dexter*, for the plaintiffs.

By Court, CHAPMAN, J. The parties are owners of adjoining lands, and the defendant's house stands on or near the line. The construction of his deed was settled in the former case between the same parties: *Codman v. Evans*, 1 Allen, 443. He has erected a bay-window, which extends beyond the line over the plaintiff's land, and maintains it there. The justification which he sets up in this action is, that there is a highway over the plaintiff's land extending to the line, and that his structure does not interfere with the use of the way. But this furnishes no legal defense. Nothing is better settled than that a highway leaves the title of the owner unaffected as to everything except the right of the public to make and repair it and use it as a way, and for some other public purposes, such as drainage and the laying of aqueducts; and that an adjoining proprietor has no more right to erect and maintain a permanent structure over the land than if no highway was there. A mere easement has passed to the public, leaving the fee in the owner. An adjoining proprietor may have occasion to use the way in connection with his land, in a different manner from other people. In *O'Linda v. Lothrop*, 21 Pick. 292, it was held that he might swing his gate or door over the way, suffer his horses or carriages to stand upon it, lay build-

ing materials upon it designed to be used on his land, and throw earth upon it as he removed the earth from his cellar. But these are all temporary acts, and are connected with the use of the way. He may spread earth upon it to make it more level and his access to it from his premises more convenient; but this is merely fitting it more perfectly to be used as a way. In *Underwood v. Carney*, 1 Cush. 285, the uses of the way which were held to be legal were of the same character as those in *O'Linda v. Lothrop*, 21 Pick. 292. They did not constitute permanent occupation; nor do those cases justify any occupation except for a reasonable time, and as connected with its use as a way. Here the occupation has been permanent, and having no connection with the use of the way.

The evidence of the alleged custom was rightly rejected. If there be a custom in Boston to erect bay-windows, balconies, and other structures over the streets, provided they do not interfere with the rights of the public, by proprietors who own the soil of the street, such a custom has no application to the case. If it be a custom to erect them over the land of other people, such a custom is illegal; and the defendant cannot justify himself in occupying his neighbor's property as a part of his dwelling-house on the ground that such trespasses are customary in Boston: *Homer v. Dorr*, 10 Mass. 26; *Waters v. Lilley*, 4 Pick. 145 [16 Am. Dec. 333]. In some of our ancient highways, the fee has always been in the town. Probably this is the case as to many of the streets of Boston. It does not follow from the decision of this case that the public could maintain an action like the present. There are also many cases where lands adjoining the highway have been so conveyed that, by our established construction of deeds, the fee of the land from the side line to the center of the highway remains in the grantor, though both parties actually supposed it was conveyed. It is now too late to discuss the question whether it would not have been better to hold that all deeds bounding on the highway conveyed all the rights of the grantor as far as the middle of the way, as deeds bounding on streams extend to the thread. But in such cases, where there are no covenants such as are contained in the deed of Amory to Apthorp respecting the way and defining the rights of the parties (see *Codman v. Evans*, 1 Allen, 444), and where the grantor has no other land adjoining the highway to be affected by building a structure over the way, and can have no pos-

sible use of his fee so long as the highway exists, it does not follow from the decision in this case that he can maintain an action for the erection of such a structure. For in the present case, the plaintiff not only has a right to have the whole space occupied by the street open, from the soil upwards, for the free admission of light and air, and the prospect unobstructed from every point, but it is a right of appreciable value in reference to himself and his grantees, who are proprietors of the other land adjoining the way. If the defendant may obstruct the light and air and prospect by means of a bay-window, he may by a much larger structure, and thereby greatly injure the property bounding on the street.

These views make it unnecessary to decide the questions argued as to the actual existence of the highway; because, if it does exist, that fact does not constitute a defense to the action.

Exceptions overruled.

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ORIGINAL OWNER OF LAND DEDICATED MAY MAINTAIN EJECTMENT against a permanent encumbrancer, who occupies or uses the whole or a portion of the land for purposes repugnant to or inconsistent with the public use: *Gardiner v. Tisdale*, 60 Am. Dec. 407, and note. The principal case is cited in *Cox v. Louisville etc. R. R. Co.*, 18 Ind. 193, to the point that the owner of the fee in land subject to an easement as a highway may maintain ejectment against one wrongfully encroaching thereon.

THE PRINCIPAL CASE IS CITED in *Dickinson v. Gay*, 7 Allen, 34, to the point that evidence of a usage to contradict a settled rule of law ought not to be received.

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## SLAWSON v. LORING.

[5 ALLEN, 840.]

INDORSEMENT OF DRAFT BY HUSBAND TO WIFE, and her subsequent indorsement of it, with his assent, to another, are sufficient to vest a valid title in the latter.

DRAFT BINDS ACCEPTOR PERSONALLY, THOUGH ADDRESSED TO AND ACCEPTED BY HIM AS AGENT, if it fails to disclose his principal on its face. Thus the acceptor was held personally liable on a draft in this form, viz.: "Office of the P. L. M. Co., Hancock, Mich., June 5, 1861, E. T. L., Agent. At four months' sight, pay to the order of I. H. S., four hundred dollars, and charge the same to the account of this company." Signed "I. R. J., Agent," and accepted by "E. T. L., Agent."

ACTION of contract against the acceptor of two drafts in the following form, viz.: "No. 40. Office of Portage Lake Manufacturing Company, Hancock, Michigan, June 5, 1861. E. T.

Loring, Agent, 49 State Street, Boston. At four months' sight, pay to the order of I. H. Slawson four hundred dollars, and charge to the account of this company. \$400. I. R. Jackson, Agent." Written across the face of the draft were the words, "Accepted, June 15, E. T. Loring, Agent," and indorsed upon the back the following: "Pay to order of Mary M. Slawson, I. H. Slawson. Pay to Dupee, Beck, and Sayles, or order, Mary M. Slawson. Without recourse to Dupee, Beck, and Sayles." The drafts were the same, except as to the amount.

*C. B. Goodrich and I. J. Austin*, for the plaintiff.

*S. Bartlett and D. E. Ware*, for the defendant.

By Court, BIGELOW, C. J. The plaintiff shows a good title to the drafts. It is true that the payee, by his indorsement and delivery of them to his wife, vested the property in her; but they were choses in action, the possession and control of which he might at any time during coverture resume. This he did by procuring her indorsement thereon, taking them into his own hands again, and passing them over to the plaintiff. Her indorsement having been made by his authority and assent, was sufficient to vest the title in her indorsee: *Stevens v. Beals*, 10 Cush. 291; *Allen v. Wilkins*, 3 Allen, 321.

The only other question arising on the agreed statement of facts is, whether the defendant is liable as acceptor of the drafts. This depends exclusively on the fair result of the inspection of the drafts themselves,—that is, whether on the instruments as they appear, it can be reasonably inferred that the acceptor disclosed his principal, and that the intent was to bind the principal and not himself. Being negotiable paper, all evidence *dehors* the drafts is to be excluded. It is wholly immaterial, therefore, that the defendant was in fact the agent of the company named on the face of the drafts, that the plaintiff knew that he was so, and that the defendant had no personal interest in the company: *Fuller v. Hooper*, 3 Gray, 334, 341; *Bank of British North America v. Hooper*, 5 Id. 567 [66 Am. Dec. 390]; *Draper v. Massachusetts Steam Heating Co.*, 5 Allen, 338. The rule excluding all parol evidence to charge any person as principal, not disclosed on the face of a note or draft, rests on the principle that each person who takes negotiable paper makes a contract with the parties on the face of the instrument, and with no other person.

Taking the signature of the defendant as acceptor, written across the face of the drafts, by itself, without reference to

other parts of the instruments, it is clear that it would bind him personally. It discloses no principal, nor is it in a form which would exclude the personal liability of the acceptor. It is equivalent to this promise: "Having funds of the drawers in my hands, I hereby agree to pay the amount of the drafts at maturity." The addition of the word "agent" to his name is not sufficient to exempt a party from liability on such a contract. It is a mere *descriptio personæ*, designed to indicate the fund to which the money is to be charged, or the use to which it is to be appropriated. This is clear on the authorities: *Forster v. Fuller*, 6 Mass. 58 [4 Am. Dec. 87]; *Thacher v. Dinmore*, 5 Id. 299 [4 Am. Dec. 61]; *DeWitt v. Walton*, 9 N. Y. 571; *Seaver v. Coburn*, 10 Cush. 324; *Fiske v. Eldridge*, 12 Gray, 474; *Haverhill Ins. Co. v. Newhall*, 1 Allen, 130; *Mare v. Charles*, 5 El. & B. 978.

We are then to look at other parts of the instruments to see whether there is anything to indicate that the acceptor signed as agent for a principal who, by reasonable intendment, can be held to have been disclosed to the purchaser of the drafts. The first and most obvious conclusion which is to be drawn from the form of the bills is, that the drawer signs his name as agent of the company named therein, and that they are intended as drafts, not of the agent, personally, on his own funds in the hands of the drawee, but as those of the principals, acting through their agent, on funds belonging to the company. This appears clearly from the fact that the bills bear date at the office of the company in Hancock, Michigan, and direct the drawee to charge the amount of them "to the account of this company," the drawer signing his name after these words. No one can doubt that on bills thus drawn the agent fully discloses his principal, and that the drawer could not be personally chargeable thereon. So far as the liability of the drawer is concerned, the case is not unlike that of *Fuller v. Hooper*, 3 Gray, 334. This construction of the instruments declared on is not without its bearing on the liability of the drawee. It gives full effect to the forms of the bills, to the fact that they are drawn on blank printed forms manifestly prepared for the use of the company, and that they are dated at the office of the company in the place where their business is chiefly carried on. These circumstances have reference to the capacity in which the bills were signed by the drawer. It is his language which they speak, and they show his intent to disclose the principals for whom he acted as



agent in making the drafts. So much, then, of the language of the instruments is appropriated and exhausted in qualifying the liability of the drawer. It is difficult to see how they can be again applied in giving an interpretation to the instrument which shall also absolve the drawee to whom they were addressed, on his separate and distinct contract as acceptor. They can have no meaning beyond that which they plainly import, namely, an order by the company, through their agent, to pay to the holder a certain amount of money. What, then, is left on the face of the drafts to show that the defendant is not liable as acceptor? Nothing, except the single circumstance that the address to him as drawee is printed in large capital letters at the top of the bills, between the date and the body of the instrument, with the addition thereto of the word "agent." This certainly does not necessarily or even *prima facie* indicate that he is the agent of the drawers. It is, to say the least, equally consistent with the idea that he is the agent of some third person not named on the face of the bill. Nor can we give any great effect to the fact that the defendant's name, as drawee, is printed as part of the blank used by the company. A draft, or bill in like form, might be used, if their course of business was to deal with him as the agent of some other person or company. We are unable to see, therefore, that there is anything on the face of the bills which, fairly interpreted, discloses any principal for whom the defendant acted in accepting the bill whereby he can be absolved from personal liability thereon.

But there is another and broader view of the contract into which the parties entered, which is strongly indicative of an intent by the defendant to be bound by his acceptance. The instruments declared on purport to be bills of exchange, having a drawer and acceptor. By putting their contract in such form, the intention of the parties must have been to issue paper which should be received by those who took it in the usual course of business, according to the legal and ordinary effect which such form imports, as giving to the holder the security of the names of the parties. Otherwise, if they intended to bind one party only, it is reasonable to suppose the bills would have been drawn by the company on itself, in which case the direction and request to pay would have been on the company by its name, and not upon an individual described only as an agent. The argument urged in support of the defense would pervert the bills into a contract different from that which they

import on their face. If they should be construed to be drafts by the company on itself, they would be in legal effect merely promissory notes on which the holder would have only the security of one name, which would be contrary to the intent and purport of the instruments. The early case of *Thomas v. Bishop*, 2 Strange, 955, and Rep. temp. Hardw. 1, cited with approval by this court in *Taber v. Cannon*, 8 Met. 456, 460, is strikingly like the case at bar. It was the case of a draft drawn by a company addressed to their cashier, who was a servant in the employment of the company. It was accepted by him, and he was held personally liable on the draft.

Judgment for the plaintiff.

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ADMISSIBILITY OF PAROL EVIDENCE TO AFFECT INDORSEMENT: See *Prescott Bank v. Caverly*, 66 Am. Dec. 473, and note 477; *Vore v. Hurst*, 74 Id. 268, and note 275. In *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 104, and *Brown v. Butler*, 99 Id. 180, the principal case is cited to the point that the indorsement of a promissory note cannot be varied by parol evidence. Thus, evidence is not admissible to charge a person as principal whose name is not disclosed as such on the face of a note or bill: *Burlingame v. Brewster*, 79 Ill. 516; *Brown v. Parker*, 7 Allen, 339; *Barlow v. Congregational Society*, 8 Id. 461; *Shoe and L. N. Co. v. Dix*, 123 Mass. 151; but if the principal is fully disclosed by the instrument, he is undoubtedly liable: *Carpenter v. Farnsworth*, 106 Id. 562; *Goodenough v. Thayer*, 132 Id. 156.

HUSBAND AND WIFE COULD NOT CONTRACT WITH EACH OTHER at common law; and in *Gay v. Kingsley*, 11 Allen, 348, it is said that this rule has not been changed in Massachusetts; and the court, explaining the principal case in this regard, say that "the remark of the court [in the principal case] that the title to the note passed to the wife by the indorsement of the husband during coverture, was not intended to imply that a husband could make a valid contract of indorsement with his wife. The remark is to be taken in connection with the whole case, by which it appeared that she acted merely as his agent, and that by the indorsement to her, and by her to Dupee, Beck, and Sayles, it was intended that she should be a mere conduit in passing the title of the note to them, for the benefit of the plaintiff, and as his agent, she never pretending to have any interest in the transaction." In *Roby v. Phelon*, 118 Mass. 542, it is said, in the same regard, that "unless the decision can be supported upon the ground that the wife acted only as the husband's agent, and as a mere conduit for passing the title to the indorsee, as suggested in *Gay v. Kingsley*, and thus stand as if the name of the wife, as indorsee and indorser, had been stricken out by the husband before he delivered the bill, leaving it indorsed by him to the subsequent indorsee, it is inconsistent with the earlier and later decisions of this court."

## AUDENRIED v. BETTELEY.

[5 ALLEN, 383.]

**ASSIGNMENT IN INSOLVENCY DOES NOT VEST IN ASSIGNEES** property which has been put into the debtor's hands for the fraudulent purpose of giving him a false credit, although some of his creditors may have been defrauded thereby.

**BILL** in equity against Hammond, an insolvent, and his assignees for an accounting, and to recover certain property or its value. The opinion states the facts.

*S. Bartlett and D. Thaxter*, for the plaintiffs.

*J. G. Abbott and G. A. Somerby*, for the defendants.

By Court, HOAR, J. It was said by Lord Denman, in *Pickard v. Sears*, 6 Ad. & E. 474, that "the rule of law is clear that, where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." This was said in a suit where the plaintiff, a mortgagee of personal property, had allowed it to be seized and sold by a sheriff for a debt of the mortgagor, and purchased by the defendants, without making any claim or disclosure of his title; and had so conducted in negotiations with the defendants as to lead them to the belief that the property was the debtor's. The court held that the evidence might authorize a jury to find that he concurred in the sale.

The doctrine of *Pickard v. Sears*, 6 Ad. & E. 474, was recognized by Baron Parke in *Freeman v. Cooke*, 2 Ex. 663, "as established," and the rule fully explained and illustrated. It is there said that "in most cases to which the doctrine in *Pickard v. Sears* is to be applied, the representation is such as to amount to the contract or license of the party making it": p. 664. That case was by the assignees of a bankrupt against a sheriff, for taking property of the bankrupt as the property of a third person. The bankrupt had represented the property to belong to the third person, in order to prevent it from being seized as his own; but had not intended to have it taken as the property of the other; and when he found that the officers had a writ against the other, retracted his statement. It was held that the plaintiffs were not estopped from maintaining the action.

The doctrine has been reaffirmed and fully approved in *Howard v. Hudson*, 2 El. & B. 1; and has been repeatedly sanctioned in this commonwealth: *Dewey v. Field*, 4 Met. 381 [38 Am. Dec. 376]; *Coggill v. Hartford and N. H. Railroad*, 3 Gray, 549, by Bigelow, J., *arguendo*; *Osgood v. Nichols*, 5 Id. 420.

It may therefore be conceded, if the plaintiffs put their property into the possession of Hammond, with the fraudulent purpose of giving him a false credit, that any creditor of Hammond, who was induced to give him credit by reason of his apparent ownership of that property, might have attached it as the property of Hammond, and the plaintiffs would not have been permitted to set up their title against such an attachment.

The defendants then contend, as this property might have been taken on execution by any creditor of Hammond who had been induced by the fraudulent acts of the plaintiffs to give him credit, that by the express terms of the insolvent law it passes by the assignment of his estate in insolvency. The language of the statute is, that "the assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed, or which might have been taken on execution upon a judgment against him at the time of the first publication," etc.: Gen. Stats., c. 118, sec. 44.

The material question then is, whether this property can be regarded as "the property of the debtor" Hammond, "which might have been taken on execution upon a judgment against him" within the meaning of the law. We are of opinion that it cannot.

Under the English bankrupt law, this case is provided for by express legislation: Stat. 21 James I., c. 19, sec. 11; 13 Eliz., c. 5; 27 Id., c. 4. But these statutory provisions tend to show that the common law was otherwise, and they have never been incorporated into our insolvent system.

An estoppel *in pais*, on the ground of fraud, is personal to the particular creditor defrauded, and does not pass the property so as to inure to the benefit of creditors generally. As was said by Mr. Justice Curtis, in *Hawes v. Marchant*, 1 Curt. C. C. 144: "To constitute such an estoppel, a party must have designedly made an admission inconsistent with the defense or claim which he proposes to set up, and another party have, with his knowledge and consent, so acted on that admission

that he will be injured by allowing the admission to be disproved; and this injury must be coextensive with the estoppel."

The analogy has been strongly pressed upon us in argument, of a conveyance of property by a debtor in fraud of creditors. The debtor could not himself afterward convey it, but creditors might take it on execution. This would pass to the assignees for the general benefit of creditors: *Grant v. Lyman*, 4 Met. 473. And it was decided in *Norton v. Norton*, 5 Cush. 524, that where an administrator had a license to sell the real estate of his intestate, including "all that the deceased may have conveyed with intent to defraud his creditors," the estate thus sold becomes general assets, to be distributed among all the creditors *pro rata*, although the conveyance may have been fraudulent only against existing creditors at the time it was made, and not as against subsequent creditors. But the defect in this analogy is that the property, which a debtor attempts to convey in fraud of creditors, has once been his. When the conveyance is avoided by a creditor, or by one succeeding to the rights of a creditor, in the mode prescribed by law, it is the property of the debtor which is to be dealt with. The assignee takes it as property which, in contemplation of law, has remained the debtor's property. But in the case at bar, the property never was the property of Hammond. If it had been sold by the plaintiffs before it had been taken by legal process on behalf of any creditor actually defrauded, a good title would have passed. If the plaintiffs had become insolvent, it would have passed to their assignees.

The mere right to take property on execution by virtue of a lien acquired by attachment on mesne process does not pass to the assignee. Under the statute of 1838, if a creditor had attached property which, after his attachment, had been conveyed to a third person, the assignment in insolvency dissolved his attachment, although the effect was to perfect the title of the grantee, and not to convey the property to the assignee: *Grant v. Lyman*, 4 Met. 473; *Shelton v. Codman*, 3 Cush. 318. The supplementary act of 1841, c. 124, sec. 5, was passed to furnish a remedy against this result, by providing that the attachment might survive in such a case, and the suit be prosecuted by the assignee to secure the property attached for the benefit of the estate. But this act would have been unnecessary, if, by statutes of 1838, c. 163, sec. 5, the property attached would have passed to the assignee upon

the dissolution of the attachment. Yet it was property that the particular creditor who had attached it had a right to take on execution at the time of the first publication; but it was not then the property of his debtor.

The effect of an estoppel which existed as to rights of property between the debtor and third persons would pass to an assignee; but we do not think the insolvent law intended to pass rights by estoppel between the creditor and third persons. Each creditor who was actually defrauded may still have his action against the plaintiffs. But this right of action, which is special and individual, is not transferred to the assignee of the debtor in insolvency; and the right to treat the property which was fraudulently represented as the property of the debtor as if it were really his property seems to us equally the personal right of the creditor who was defrauded, and not transferable by the assignment for the benefit of creditors generally.

The second issue tendered by the defendants was, therefore, immaterial, and the refusal to submit it to the jury must be sustained.

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THE PRINCIPAL CASE IS CITED as an authority stating the modern doctrine of estoppel *in pais*, and Mr. Justice Curtis's rule, as therein quoted, is adopted as the settled law, in *Bragg v. Boston and W. R. R.*, 9 Allen, 61; *Plumer v. Lord*, Id. 458; *Langdon v. Doud*, 10 Id. 436; *Andrews v. Lyons*, 11 Id. 351; *Fall River Bank v. Buffinton*, 97 Mass. 501; *Zuchtman v. Roberts*, 109 Id. 54.

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### SMITH v. ALLEN.

[5 ALLEN, 454.]

PROMISE BY WOMAN TO MARRY GRANTOR IS GOOD CONSIDERATION FOR DEED, and she will be entitled to hold the land against his creditors, although the marriage is prevented by his death.

BILL in equity. The opinion states the facts.

A. B. Merrill, for the plaintiffs.

C. W. Loring and S. Snow, for the defendant.

By Court, MERRICK, J. The plaintiffs are the surviving partners of the late firm of Smith, Lougee, & Co., of San Francisco. The estate, of which they seek to recover possession by judgment in this suit against the defendant, was purchased by Paige, the deceased partner, and was paid for by him with

money which he secretly and fraudulently abstracted from the funds of the company. The company is now insolvent, and the plaintiffs claim to have a right to recover possession of the demanded premises, that they may apply the avails of the estate towards the payment to their creditors of the several sums due to them. As the joint property of partners is always deemed to be a trust fund primarily to be applied to the payment of partnership debts, their creditors have a right to pursue and reclaim it, or the product of it, into whatever form it may have been changed, from the possession of all persons who have not acquired a superior title to it: 2 Story's Eq. Jur., secs. 1253, 1259.

The estate thus purchased and paid for by Paige with the money of the company, was conveyed by him to the defendant. This bill, therefore, can be maintained against her to recover the possession of it, unless she was a purchaser thereof in good faith, without notice of the fraudulent misconduct of Paige, and for a valuable consideration. But if she was such a purchaser, then she acquired a superior title to the estate, which, having become absolutely vested in her by the conveyance, could not afterwards be defeated by the creditors of her grantor: 2 Story's Eq. Jur., sec. 1258; 1 Id. 108, 381.

It is immaterial at what time the consideration was paid or passed, if it passed before she had any notice of the fraud, and before any claim of title was set up or asserted against her by the surviving partners, or by the creditors of the company. For it is a well-settled principle that a deed which is voluntary or fraudulent in its creation, and voidable by creditors or subsequent purchasers, may become good and indefeasible by matter *ex post facto*: 4 Kent's Com.. 6th ed., 463; *Sterry v. Arden*, 1 Johns. Ch. 261.

Upon examination of the uncontroverted evidence produced on behalf of the defendant, it is apparent that Paige conveyed the demanded premises to her to induce her to enter into an engagement to marry him. On the 11th of April, 1853, his wife, Sarah Ann Paige, died at San Francisco. And in a letter bearing date the 24th of June then next following, addressed by him from that place to the defendant, then resident in this state, he offered himself to her in marriage. He urged her acceptance of his offer, and among other things, said: "The estate"—referring to the demanded premises—"you may regard as your homestead, and I trust it will be a very dear spot to you, the same as it was to your dear Aunt Sarah,



and the children of our mutual love." The import and significance of this proposal cannot be mistaken or misunderstood; it was manifestly tendered as an independent provision for her support, which might prevail upon and induce her to accede to his wishes. On the 15th of the next ensuing month of July, he wrote to his agent Goldsbury, inclosed in his letter a power of attorney from himself, and directed him to make, execute, and deliver a deed of the demanded premises to her. Accordingly, Goldsbury, in pursuance of the power and of the directions given to him, executed the deed, which was delivered to and accepted by her on the 8th of the following month of September. Of course, after the offer which had been made to her, she perfectly understood the object and purpose of the conveyance. And in a letter bearing date the 29th of October,—which was a little less than two months after her acceptance of the deed,—written and addressed by her to Paige, and which was received by him upon the sixth day of the ensuing month of December, on which day he acknowledged its receipt, she distinctly accepted his offer and made an unqualified promise to marry him. The correspondence between the parties was continued, and their contract to marry and be married to each other remained in full force during his life. Their marriage was prevented by his death, which occurred early in the following year, in Oregon, where he went on a journey of business, to which he had alluded in one of his previous letters to her.

It is not alleged or pretended that the defendant had any knowledge or suspicion of the fraudulent acts of Paige. On the contrary, it is manifest from all the facts and circumstances which have been disclosed in the case that she believed, and had reasonable cause to believe, that he was a man of wealth, engaged in successful and prosperous business, and that throughout the whole transaction, and in contracting her engagement to him, she conducted herself in perfect good faith. The only question, therefore, is, whether her contract and promise to marry him constituted a good and valuable consideration for the estate which he had conveyed to her.

There is no doubt that marriage is a valuable consideration. It has always been so regarded. Chancellor Kent says it is held to be of high consideration, and of such weight and force that a marriage formally solemnized subsequently to the conveyance will make a mere voluntary deed good and effectual, and will fix the interest in the estate conveyed indefeasibly in

the grantee: 4 Kent's Com., 6th ed., 463. It was so expressly determined in the case of *Sterry v. Arden*, 1 Johns. Ch. 261. And it is there stated by the court that although nothing was said by the parties concerning the consideration for the conveyance, either at the time of the solemnization of the marriage, or in the negotiation which preceded it, yet the law will presume that the property conveyed for that purpose did constitute some part of the consideration which induced the party who received it, and who was to be benefited by it to enter into that relation: *Huston v. Cantril*, 11 Leigh, 176. If, therefore, the defendant had been actually married to Paige on the 29th of October, when she promised to marry him, she would be deemed to have been a purchaser for a valuable consideration, and would be held to have taken the estate conveyed to her, free and purged of any fraud against his partners or creditors which he might have committed. Her title in that case would have been clear and indefeasible. And in reference to the question of the sufficiency and value of the consideration, and consequently, of the validity of the title acquired by the conveyance, there does not appear to be any real and substantial distinction between a marriage formally solemnized, and a binding and obligatory agreement, which has been fairly and truly and above all suspicion of collusion made, to form such connection and enter into that relation. All the consequences of a legal obligation accompany such an agreement. The law enforces its performance by affording an effectual remedy against the party who shall, without legal excuse, fail to fulfill it. But a contract of this kind is not to be regarded as a valuable consideration, merely because damages commensurate with the injury may be recovered of the party who inexcusably refuses to fulfill it. It is peculiar in its character, and has other effects and consequences attending it. It essentially changes the rights, duties, and privileges of the parties. They cannot, while it exists, without a violation of good faith, as well as of the material legal obligations to which it subjects them, negotiate a contract for such alliance with any other person. A woman who has voluntarily made such an agreement cannot, without indelicacy, and so not without exposing herself to unfavorable observation and to some loss of public favor and respect, seek elsewhere, except for good and substantial reasons for withdrawing from an engagement by which she has bound herself for preferment in marriage; and thus her promise and agreement to marry a

particular person essentially change her condition in life. They materially affect, not only her opportunities, but her right to attempt in that way to improve it. A legal contract and promise made in good faith to marry another must, therefore, like an actual marriage, be deemed to be a valuable consideration for the conveyance of an estate, and will justly entitle the grantee to hold it against subsequent purchasers, or the creditors of the grantor.

Applying these principles to the facts disclosed in the present case, it follows as a necessary consequence that the bill cannot be maintained.

Judgment must therefore be entered for the defendant.

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MARRIAGE AS CONSIDERATION FOR DEED: See *Verplank v. Storry*, 7 Am. Dec. 348, and note 362-364, citing among other cases the principal case.

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## COMMONWEALTH v. COOPER.

[5 ALLEN, 495.]

DYING DECLARATION SHOULD BE ADMITTED AS SUCH where the person making it believed that he could not recover, though he lived seventeen days after making it.

AFTER EVIDENCE THAT ONE INDICTED FOR CRIME HAD ENDEAVORED TO PROCURE WITNESS TO SWEAR FALSELY to facts tending to prove *alibi*, he cannot be allowed to show that on full investigation the selectmen of the town where he lived had before that time assured him that they were satisfied of his innocence.

DECLARATIONS OF DEFENDANT IN INDIOTMENT TO ONE WHO WAS SEARCHING HIS HOUSE after commission of the crime, are not admissible in his own favor.

DYING DECLARATIONS ADMITTED TO PROVE IDENTITY OF DEFENDANT as the person who committed a crime may be rebutted by evidence showing that deceased had met and talked with persons with whom he was well acquainted, and had mistaken them at the time for other persons whom they did not resemble, and that he was in the habit of thus mistaking persons.

INDICTMENT for manslaughter. Besides the evidence stated in the opinion, the commonwealth showed that defendant asked William Simmons to swear that on the evening of the day when the offense was committed, he went by defendant's house and saw a light in her house. To control this, the defendant offered evidence that before the time when she said this to Simmons, the selectmen of Nantucket had assured her that upon a full investigation, they were satisfied of her innocence; but the evidence was rejected. Macy, one of the

selectmen, also testified for the commonwealth to a search and examination of defendant's house and its contents. Defendant offered to prove her declarations to him on this occasion, but the evidence was rejected. The remaining facts appear in the opinion.

*E. M. Gardner*, for the defendant.

*Foster*, attorney-general, for the commonwealth.

By Court, METCALF, J. The court are of opinion that the testimony of Fitzgerald, as to the statement made to him by the deceased concerning the assault upon her by the defendant, was rightly admitted in evidence as a dying declaration. The deceased had said to him that she could not live, and that she had sent for him to make a request respecting her funeral. We think this satisfactorily shows that her subsequent statement was made under a sense of impending death,—a consciousness that she was near her end: 1 Greenl. Ev., sec. 158; *Commonwealth v. Casey*, 11 Cush. 421. She lived seventeen days afterwards; but declarations made by a deceased person, when he believed that he should not recover, have been decided to be admissible although he lived eleven days after making them: *Rex v. Mosley*, 1 Moody C. C. 97; and *Regina v. Reaney*, 7 Cox C. C. 209. And our judgment concurs with that of the English court of criminal appeal, as expressed by Chief Baron Pollock, in the latter of those cases. "In order," he says, "to render such a declaration admissible, it is necessary that it should be made under the apprehension of death. The books certainly speak of near approaching death; but there is no case in which any particular interval, any number of hours or days, is specified as the limit. In truth, the question does not depend upon the length of interval between the death and declaration, but on the state of the man's mind at the time of making the declaration, and his belief that he is in a dying state": Dears. & B. 151. See also Matthews on Crim. Law, 254; Powell on Evidence, 125-127; 1 Phil. Ev., 4th Am. ed., 293; Roscoe's Crim. Ev., 5th ed., 34.

The testimony which was offered in reply to that of Simmons was rightly rejected. If received, it would in no degree have palliated the defendant's attempt to cause Simmons to swear to a falsehood.

The statements made by the defendant to Macy, as to where she was on the evening when the deceased was assaulted, and as to other matters, were no part of the *res gestæ*, and were

properly excluded. They were evidently statements by the defendant in her own favor when her house and its contents were searched for the purpose of obtaining evidence of her guilt.

But the court are of opinion that the testimony should not have been excluded which was offered to show that the deceased had met with persons well acquainted with her, and with whom she was well acquainted, and had mistaken them at the time for other persons whom they did not resemble; and that she was in the habit of thus mistaking persons. We think this was testimony proper for the consideration of the jury.

The great question in the case was, whether the defendant was the person who caused the deceased's death,—a question of identity. And according to the declaration of the deceased, the assault was made upon her immediately after the person making it had entered her room, which was dimly lighted, and before that person had uttered a dozen words.

A defendant against whom dying declarations are received has not the opportunity of cross-examining the declarant. Hence it is justly held that he is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of a more full investigation by means of cross-examination: *Ashton's Case*, 2 Lew. C. C. 147. "It is to be considered," says Mr. Greenleaf, "that the particulars of the violence, to which the deceased has spoken, were, in general, likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed; and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative": 1 Greenl. Ev., sec. 162.

New trial granted.

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DYING DECLARATIONS, WHEN ADMISSIBLE: See *McDaniel v. State*, 47 Am. Dec. 93, and note 101; *Commonwealth v. McPike*, 50 Id. 727; *Commonwealth v. Casey*, 59 Id. 150; *State v. Johnson*, 74 Id. 321. The principal case is cited in *Commonwealth v. Roberts*, 108 Mass. 301, and *Commonwealth v. Hancy*, 127 Id. 457, to the point that if the deceased, at the time of making the declarations, believed that he was in a dying state, the evidence is admissible, though in fact he lived several days after making his statement.

TESTIMONY CONCERNING IDENTITY OF PERSONS MAY BE REBUTTED by other evidence showing that the witness was in the habit of mistaking persons with whom he was well acquainted for others: *State v. Witham*, 72 Me. 538, citing the principal case.

## LAMSON v. PATCH.

[5 ALLEN, 586.]

**IT IS NOT CONSTRUCTIVE DELIVERY OF HAY AS CHATTEL, SO AS TO PASS TITLE TO IT, AS AGAINST THIRD PERSONS, UNDER A SALE OF GRASS WITH AN AGREEMENT THAT THE VENDOR SHALL CUT IT AT THE PROPER TIME, TO PLUCK A HANDFUL OF THE HALF-GROWN GRASS, AND DELIVER IT TO THE PURCHASER IN THE FIELD.**

TORT for conversion of hay. Lamson, the plaintiff, being the owner of a farm, leased it to Withington for one year, it being agreed that Withington might use a quantity of hay then upon the premises, and that an equal quantity of the next season's hay should be left by Withington at the termination of his tenancy. Meanwhile Lunt purchased all the hay standing on Lamson's premises, being the crop of which Withington would claim a part. The delivery to Lunt was that mentioned in the opinion. Withington cut the hay, whereupon, his tenancy ending, the plaintiff raked it and put it in the barn. Withington, by Lunt's authority, then sold a portion of it to defendant, and plaintiff now seeks to recover the value thereof. The remaining facts appear in the opinion.

*E. W. Kimball*, for the plaintiff.

*S. B. Ives, Jr.*, for the defendant.

By Court, HOAR, J. The plaintiff was in the actual possession of the hay when it was taken by the defendant. He had taken lawful possession of the farm, terminated the tenancy of Withington, harvested the hay and put it into the barn, as his own property. His title to maintain the action is therefore clear, unless Lunt, under whom the defendant claims, had acquired a better title.

If the title of Lunt was a mere executory contract, the plaintiff had the same, and one earlier in date. Withington had agreed to leave all the hay cut on the farm for his use, and the consideration for this agreement had been paid. But there had been no delivery of the hay under this contract, and if there had been a sale and delivery of the grass to Lunt, his title became perfect.

The question upon which the case turns, therefore, is, whether plucking a handful of growing grass and delivering it to a purchaser in the field, as in part execution of a contract of sale of the whole crop, is a good symbolical delivery of the whole? We are all of opinion that it is not. The time when this act was done was the first day of June. The grass was

but six inches high. It was therefore not fit to cut, and but partially grown. The agreement was that Withington should cut and cure it "at a proper time"; and this time does not seem to have arrived until several weeks afterward, and when Withington's estate in the land had terminated.

It is said that the symbolical delivery was all which the nature of the case would admit; and several cases have been cited in argument in which such a delivery has been held to be sufficient. But these are all cases of actual chattels, as logs in a boom, or in a river, and the like; where the thing to be delivered was capable of possession by one party as much as by the other; and where, by the intent and understanding of the parties, the delivery made was intended to transfer the immediate unqualified dominion of the property to the vendee. But in this case, the grass was not fit to cut, and was not intended to be cut until it should have grown. There is nothing in the case to show that it was the product of the labor and skill of the tenant. As was said by Metcalf, J., in *Stearns v. Washburn*, 7 Gray, 188, "until severed, the grass was not personalty, not goods or chattels, but was part of the realty." And see the cases there cited; and *Empson v. Soden*, 4 Barn. & Adol. 655.

There seems no difference in principle between the effect of such a delivery as was made by Withington to Lunt, and a delivery of a handful of the roots of the grass in the autumn or winter, by a tenant for years, as a partial delivery on a sale of the successive crops for any number of years to which his tenancy might extend.

As the grass was not sowed by the tenant, it is conceded at the bar that the doctrine of emblements has no application: *Graves v. Weld*, 5 Barn & Adol. 111. And it may well be doubted whether it is ever applicable where the tenant's estate is terminated under a notice to quit for non-payment of rent.

The verdict must be set aside, and judgment entered for the plaintiff upon the report.

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SALE OF GROWING CROPS OR TREES, AND LICENSE TO ENTER, and cut, and carry them away may be revoked at any time before severance from the realty, and no title will have passed to the purchaser: *Poor v. Oakman*, 104 Mass. 316, citing the principal case; and see on this point, *Backenstoss v. Stabler*, 75 Am. Dec. 592; *Giles v. Simonds*, 77 Id. 373.



## BUFFUM v. STIMPSON.

[5 ALLEN, 591.]

**LEGAL PRESUMPTION, IN ABSENCE OF CONTRADICTORY EVIDENCE, IS IN FAVOR OF JURISDICTION** of court of record of another state, which has assumed to exercise jurisdiction over the subject-matter in controversy between parties residing there. Thus, under an order of a court of record of another state that certain property should be discharged from a mortgage thereon, upon the filing in court, within a specified time, of a bond, with sureties to be approved by the clerk, and with condition to pay the sum, if any, which should be found due upon the mortgage debt, a duly certified copy of the record of the court, showing that a bond was received and placed on file by the clerk, and subsequent proceedings had which necessarily implied an approval and acceptance of the bond, is sufficient to prove the discharge of the property from the mortgage.

**REPLEVIN.** Plaintiff claimed under a bill of sale from one Hubbell. Defendant relied on an assignment of a prior mortgage from said Hubbell and one Amos. Plaintiff set up that the schooner (the property in dispute) had been discharged from the mortgage by certain judicial proceedings in Wisconsin. Plaintiff, against defendant's objection, was allowed on the trial to show, by the record of a court of Wisconsin, that such court had ordered the mortgage discharged upon the filing in the court of a bond, with approved sureties, and within a specified time, and with condition to pay the sum, if any, which should be found due upon the mortgage debt, and that such a bond was received and placed on file by the clerk, and approved and accepted.

*S. H. Phillips*, for the defendant.

*S. B. Ives, Jr., and J. G. Wheatland*, for the plaintiff.

By Court, CHAPMAN, J. There is no validity in the objection that the court in Wisconsin had not jurisdiction. The record being properly authenticated, the presumption is in favor of the jurisdiction: *Bissell v. Wheelock*, 11 Cush. 277. The court also appears by the constitution of Wisconsin to be a court of general jurisdiction; the parties lived there, and the mortgage was made and recorded there.

The bond appears to have been received and placed on file by the clerk, and the subsequent proceedings were based upon it. The judgment for damages could have had no other basis than a discharge of the lien upon the mortgaged vessel, by the

acceptance of the bond in its stead. This must be regarded as an approval of the bond according to the order of the court.

Exceptions overruled.

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EVERY PRESUMPTION IS MADE IN FAVOR OF JURISDICTION OF COURTS of general and superior powers: See *Cooper v. Sunderland*, 66 Am. Dec. 52, and cases in note; *Knapp v. Abell*, 10 Allen, 489, the latter citing the principal case.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MICHIGAN.**

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**YAWKEY v. RICHARDSON.**

[9 MICHIGAN, 529.]

**STATE COURT CANNOT PREVENT OR OPPOSE REMOVAL OF CASE TO FEDERAL COURT, if it is legally removable thereto. In cases to which the act of Congress applies, the removal is a matter of right, and not within the discretion of the state courts.**

**JUDGMENT AGAINST DEFENDANT WAS ENTIRELY REVERSED, it appearing that the proceedings in the action were a manifest fraud, with a view to deprive the defendant of his right to remove the case to the United States court.**

**ALLOWANCE OF DISCONTINUANCE AT TRIAL AS TO ONE DEFENDANT, when upon no fair hypothesis or reasonable intendment it can be reconciled with justice, is not a matter within the discretion of the court.**

**THE opinion states the case.**

*Webber and Wheeler*, for the plaintiffs in error.

*Moore and Gaylord*, for the defendants in error.

By Court, CAMPBELL, J. The action below was brought by the defendants in error against the plaintiff in error and Curtis Emerson, upon the common counts for goods sold and delivered. Evidence having been introduced to make out the plaintiffs' case, which had no tendency to show any but sole transactions of Yawkey, the plaintiffs, without any affidavit or statement showing inadvertence, introduced a stipulation signed by Curtis Emerson, authorizing them to discontinue as against him; and thereupon moved for leave to discontinue the suit as to Emerson, so as to leave it to proceed against Yawkey alone. This was resisted upon affidavits showing

that, when the suit was commenced, Yawkey was a resident and citizen of the state of Illinois; and that a previous suit having been commenced against him in the same court for the same cause of action, he applied, under the act of Congress, to have it removed to the circuit court of the United States for the district of Michigan; when, upon the decision in his favor of the application, the plaintiffs discontinued before the order was entered.

The circuit court for Saginaw County, upon these showings, nevertheless permitted plaintiffs to discontinue as against Emerson, and directed the suit to proceed against Yawkey alone. Other questions arose upon the trial, but we do not propose to consider them.

The act of Congress allowing a defendant who is a citizen of one state, sued in a court of a state of which he is not a citizen, by those who are citizens of the latter state, to file a petition of removal when he enters his appearance, such removal when applied for in due form, and at that time, is a matter of right: Brightly's Dig. 129. But the statute will not allow this application to be postponed until other steps are taken in the cause by the applicant. Neither can the cause be removed if there are other material defendants who are citizens of the same state with plaintiffs; inasmuch as the jurisdiction arises under the United States constitution, which restricts this class of cases in that respect. It will be apparent, therefore, that the effect of the proceedings in the case before us, upon the hypothesis set up in defendants' affidavits, was, by joining Emerson as a defendant, to oust Yawkey of his right to remove the case to the United States court; when, by the discontinuance, a case is left which, but for that device, he would have been entitled of right to have transferred.

The statutes provide that the supreme court may make rules "to effectually prevent the defeat or abatement of any civil suit *ex contractu*, for either any non-joinder or misjoinder of parties, where the same can be done consistently with justice": Comp. Laws, sec. 3390. Rule 71 of the circuit court rules was adopted to carry out this provision, and makes it lawful for the circuit courts to permit such discontinuance upon terms.

It was claimed by defendants in error that the liberty to discontinue under that rule was, if not an absolute right of the party, at least in the uncontrolled discretion of the court; and also that, if controllable, it must be by *mandamus*, and not by exception.

It is true that matters resting entirely in discretion cannot usually be reviewed. But it would be going to very dangerous lengths to hold that any legal right can ever rest in the discretion of a court, or that under the pretext of discretion there should be immunity for gross frauds and abuses. We have already decided in *Winslow v. Herrick*, 9 Mich. 380, that this right of discontinuance is subject to limits, and that it is by no means universal. The statute furnishes the measure, when it permits it to be done when it "can be done consistently with justice." While this opens a wide door for discretion, and may perhaps allow courts to exercise it without appeal, in some cases where an appellate court might not have taken the same view, yet when it can, upon no fair hypothesis, or legal intendment, be reconciled with justice, it ceases to be discretionary, and becomes unlawful. Such excesses of power have never, we think, been regarded as beyond redress.

Had the discontinuance been allowed before trial, a *mandamus* would perhaps have been the most appropriate, if not the only remedy. But this point we do not decide at present.

When the proceeding takes place upon the trial, it can only come up by exceptions; and is as fairly within them as any other question arising on the hearing. In the case before us, it had a controlling influence on the reception of evidence and on the decision. And all that we can consider is, whether it went beyond a legal discretion fairly exercised.

Upon this there is no room for doubt. It appears affirmatively from their own showing that plaintiffs did not proceed to trial by inadvertence; for the stipulation of Emerson was dated several months before. The evidence introduced by them shows conclusively the impossibility of any mistake about parties. It is not the case of a partnership, where it is sometimes difficult to bring home the relation; neither is it analogous to those cases in which a party sued is found to be exempt, or incapacitated. The evidence shows affirmatively that there never could have been any proper reason for joining Emerson. There was, therefore, no foundation for any such action as was had. The affidavits introduced by the defendant, which were held by the court below to present no valid objection to a discontinuance, explain why another defendant was joined with Yawkey. The object was manifestly to defeat his opportunity of removing the cause; and was a gross fraud perpetrated to deprive him of a legal right. If such crooked devices can be practiced in courts of law with impunity, the

administration of justice will incur odium and distrust, and will deserve them.

We are not disposed to lay down any rigid rules concerning the extent of judicial discretion, in cases where a discontinuance is asked. The propriety, in each cause, depends very much upon facts apparent to the court where the cause is pending; and the party seeking such a privilege can generally present his reasons, where they exist, in such a way as to raise no difficulty in the decision.

The present case is so plain that it calls for no such attempt to deduce general rules for legitimate applications from it.

As the discontinuance against Emerson has put him out of the case, and as a discontinuance against one, except when permitted by law, is a total discontinuance, we are compelled to reverse the judgment entirely. There is no basis for a new trial; and therefore we are not called upon to consider the other law points discussed.

The other justices concurred.

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THE PRINCIPAL CASE IS CITED and approved to the first point stated in the *syllabus* in *Glens Falls Ins. Co. v. Judge of Jackson Circuit*, 21 Mich. 579; *Mabley v. Judge of Superior Court*, 41 Id. 37; and is cited in *Munn v. Haynes*, 46 Id. 145, to the point that the rule permitting a discontinuance as to some of the defendants in certain cases is measured in the scope of its application to cases "when it can be done consistently with justice."

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## DAVENPORT v. PARSONS.

[10 MICHIGAN, 42.]

**DEED EXECUTED UNDER POWER OF ATTORNEY IS NOT VALID**, unless there was an intention on the part of the attorney to execute the deed under and by virtue of the power, or at least it should not appear that the contrary intention existed.

**WHERE DEED PURPORTED TO BE MADE BY ATTORNEYS UNDER POWER FROM TWO GRANTORS**, and some evidence was given of the existence of a joint power from them, but only a power from one of them individually was produced: *Held*, that the execution of the deed could not be referred to this separate power, so as to uphold it as the deed of the grantor who had given such power.

**ACTION of ejectment by Parsons against Davenport.** On the trial defendant offered to read in evidence what purported to be the record of a deed of the premises in controversy, but plaintiff objected, and his objection was sustained. The plain-

tiff had judgment. The facts sufficiently appear in the opinion and second point stated in the *syllabus*.

*C. I. Walker*, for the plaintiff in error.

*A. Felch*, for the defendant in error.

By Court, CHRISTIANCY, J. Was the deed from Thomas Emerson and Frederick Pettis, purporting to be executed by their attorneys, R. H. Waller and Curtis Emerson, to said Frederick Pettis, properly excluded by the court below?

This is the only question necessary to the decision of this cause.

The deed was objected to on four distinct grounds; but from the view we have taken of the case, we do not deem it necessary to allude to the second and fourth grounds of objection, relating to the anomalous character of the deed growing out of the fact that one of the grantors is also the grantee.

Nor is it necessary to pass definitely upon the form of the acknowledgment, though upon principle, and from the authorities cited, we are inclined to think the acknowledgment would have been sufficient had the deed been otherwise properly executed.

But the fourth ground of objection to the deed is, that it was manifest from the terms of the deed offered in evidence that the same was not made under the power of attorney given in evidence, but purported to be made under a joint power given by Thomas Emerson and said Pettis, and no testimony was given to establish such joint power.

We think this ground of objection unanswerable. The deed did not purport to be executed by the grantors in person, the owners of the land; its validity must, therefore, depend entirely upon the power vested in the attorneys by whom it was executed. But to make a valid deed under a power of attorney, it was essential that there should have been an intention on the part of the attorney or attorneys to execute the deed under and by virtue of the power, or at least that the contrary intention should not appear.

Now, whatever might be the effect of such a deed as this, if executed by the grantors in person, or whatever may have been their object or that of the attorneys in making Pettis, the grantee, also one of the grantors, the fact that they did intend thus to join them, and that they intended to execute the deed in the name and on behalf of both, is, we think, extremely probable, if not clearly manifest from the face of the



instrument and the form of the execution. It would seem, therefore, to follow that the attorneys must have intended to act either under a joint power from the two grantors or a several power from each; though, as we shall presently see, it is not necessary here to determine whether the several power from Thomas Emerson, which was given in evidence, would have authorized the deed had it appeared to have been executed under that power. But the power or powers which would authorize the deed must be given in evidence, or the deed could not be that of either grantor, or in any manner affect the title.

The most natural inference to be drawn from the mode of execution and reference to the power is, that the attorneys intended to act under and refer to a joint power from both the grantors, in whose behalf the deed purports to be executed, and not a separate power from each or either of them; for after affixing the several signatures and seals of each of the grantors named, they add: "By their attorneys, who sign in virtue of a power of attorney."

It is true, this may not be a necessary inference, which would admit no proof to the contrary; and if two separate powers had been proved, one from each of the grantors named, it is possible this mode of execution and reference might be construed as intended to refer to the two. But the only power introduced in evidence to sustain this deed was that from Thomas Emerson and wife, to which Pettis was not a party.

It would, we think, be going a great ways to hold that this could be the power referred to by the attorneys in executing the deed, had no intimation appeared of the existence of another power which might have been intended by the reference.

But the case is not even so strong as this for the plaintiff in error. It appears from the testimony of his own witness, one of the attorneys named in this power, that when he had this instrument in his possession, he had also another power of attorney, executed to the same attorneys, by both of the grantors and Richard H. Morris (the latter of whom was dead, and his interest vested in the other grantees before this deed was executed). It is true, it does not appear what were the contents of this latter or joint power; but from the manner in which it is spoken of by the witness, there would seem to be some probability that it had, or was supposed to have, reference to this land; and this inference is strengthened by the fact that, by a stipulation between the attorneys of the re-

spective parties in the cause, it was admitted "that the signatures to a certain paper purporting to be a power of attorney from Thomas Emerson, Richard H. Morris, and Frederick Pettis" to the same attorneys "are genuine." From the nature of the case, we should naturally infer that this fact in the stipulation was inserted at the instance and for the benefit of the defendant below (plaintiff in error), as the case of the plaintiff below did not involve the necessity of any power. The inference is very strong, if not conclusive, that this was the same power of attorney spoken of by the witness Curtis Emerson as being in his possession at the same time with that from Thomas Emerson.

We have already remarked that the form of execution of the deed, and mode of reference to the power, would naturally suggest the idea of a single or joint power of attorney, executed by both grantors, under which the attorneys undertook and intended to act in executing the deed, though no such instrument had been alluded to or shown to exist. But with the additional fact that such an instrument was in existence, and in possession of the same attorney, at the same time he held possession of the several power from Thomas Emerson, the inference of an intention to act under and refer to the joint instead of the several power, becomes very strong. This inference, it is true, might have been weakened, possibly overcome, by the introduction in evidence of the joint power, if it had appeared to have no reference to the land, or to be so entirely different in purpose that the attorneys could not probably have intended to refer to it in the execution of the deed. though the mere fact of its invalidity as an authority to convey the land would not of itself take away the inference; because it might have been supposed sufficient, whether it were so or not. But the omission to offer it in evidence when its execution had been admitted, and the deed had been objected to for want of a joint power, is a very significant fact, and warranted the inference that, if produced, it would have increased the probability that this was the instrument under which the deed was intended to be executed.

Should it therefore be admitted that the several power introduced in evidence would have authorized the execution of this deed had the attorneys purported or intended to act under it, still that power could not render this deed valid, as they did not purport, and do not appear to have intended, to act under it in the execution of the deed; but it is, to say the

least, much more probable that they intended to act, and understood themselves to be acting under another power not given in evidence, and therefore of no avail in supporting the deed.

We think the deed was properly excluded, and the judgment of the court below should be affirmed, with costs.

MARTIN, C. J., and MANNING, J., concurred.

CAMPBELL, J., did not sit in this case.

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FORM AND SUFFICIENCY OF POWER OF ATTORNEY to sell and convey land: See *Carson v. Smith*, 77 Am. Dec. 539; *Marr v. Given*, 39 Id. 600; *Drumright v. Philpot*, 60 Id. 738.

THAT ACKNOWLEDGMENT AND RECORDING of a power of attorney to convey land are not necessary to render it admissible in evidence, see *Valentine v. Piper*, 33 Am. Dec. 715.

FACT AND SCOPE OF AGENCY CREATED AND PROVED BY WRITING ARE QUESTIONS OF LAW, and are properly decided by the court: *Savings Fund Society v. Savings Bank*, 78 Am. Dec. 390.

VALIDITY OF DEED UNDER POWER OF ATTORNEY. — It is a general principle of the common law, that in order to give validity to a conveyance of lands under power of attorney, the power to convey must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the lands: *Clark v. Graham*, 6 Wheat. 577; *Johnson v. Dodge*, 17 Ill. 433, 442. Thus a deed, in order to pass the legal title to lands intended to be conveyed, must be under seal: *Id.*; *Warren v. Lynch*, 5 Johns. 239; *Alexander v. Polk*, 39 Miss. 737; so a power of attorney, under which a conveyance is made, must be in writing, and must be under seal: *Peabody v. Hoard*, 46 Ill. 242; *Watson v. Sherman*, 84 Id. 263; *Butterfield v. Beall*, 3 Ind. 203; *Livingston v. Peru Iron Co.*, 9 Wend. 522; *Videau v. Griffin*, 21 Cal. 389; *Wheeler v. Nevins*, 34 Me. 54; *Elliott v. Stocks*, 67 Ala. 336; *Rowe v. Ware*, 30 Ga. 278; *Haydock v. Duncan*, 40 N. H. 45; *Shuetze v. Bailey*, 40 Mo. 69; *Williams v. Gillies*, 75 N. Y. 202. And no prior authority or subsequent ratification, either written or verbal, without seal, would be sufficient to give validity to an instrument as the deed of the party: *Drumright v. Philpot*, 16 Ga. 424; S. C., 60 Am. Dec. 738; and see *Paine v. Tucker*, 21 Me. 138; S. C., 38 Am. Dec. 255; *Rhode v. Louthain*, 8 Blackf. 413; *Smith v. Dickenson*, 6 Humph. 261. The only recognized exception to the rule, that authority to execute a deed must be by deed, is where the execution by the agent or attorney is in the presence and by direction of the principal; and this exception arises from the doctrine that what is done in the presence and by the direction of another is the act of the latter, as much so as if done by himself in person: *McKay v. Bloodgood*, 9 Johns. 285; *Burns v. Lynde*, 6 Allen, 309; *Wood v. Goodridge*, 6 Cush. 117; S. C., 52 Am. Dec. 771; *Videau v. Griffin*, 21 Cal. 392; *Frost v. Deering*, 21 Me. 156; *King v. Longnor*, 4 Barn. & Adol. 647; *Mut. Benefit Ins. Co. v. Brown*, 30 N. J. Eq. 193; compare *Wallace v. McCollough*, 1 Rich. Eq. 426; *Rockford etc. R. R. Co. v. Shunick*, 65 Ill. 223. In many of the states, a power of attorney to convey lands by deed must be proved or acknowledged, and recorded like the deed itself: *Montgomery v. Dorion*, 6 N. H. 250; *Gage v. Gage*, 30 Id. 420; *Moore v. Farrow*, 3 A. K.

Marsh. 41; *Carnall v. Du Val*, 22 Ark. 136; *Du Val v. Johnson*, 39 Id. 182; but acknowledging and recording are not required in Georgia or Indiana: *Tenant v. Blacker*, 27 Ga. 418; *Moore v. Pendleton*, 16 Ind. 781. But it is said to be the long-established practice in the former state to record powers of attorney with the deeds made under them, on the same sort of proof as that on which the deeds are recorded, and to let such powers of attorney, when thus recorded, go in evidence without further proof along with their deeds: *Tenant v. Blacker*, 27 Ga. 418, 421. That a written instrument, though not in technical form, may be a good power of attorney for the sale and conveyance of land, see *Phillips v. Hornsby*, 70 Ala. 414.

PRODUCTION AND PROOF OF POWER OF ATTORNEY. — A deed purporting to have been executed by an agent or attorney is inadmissible in evidence without proof being first made of the agent's duly executed authority: *Videau v. Griffin*, 21 Cal. 389. The power, or an authenticated copy of it, should be produced in evidence to support the deed, in order that it may be seen whether there was authority for the act to the extent to which it is performed: *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 240; *Folman v. Emerson*, 4 Pick. 160; *McMurty v. Frank*, 4 B. Mon. 41; *McConnel v. Bowdry*, Id. 392; *White v. Skinner*, 13 Johns. 307; *Newman v. Chapman*, 2 Rand. 93; *Savings Fund Soc. v. Sav. Bank*, 36 Pa. St. 498; S. C., 78 Am. Dec. 390. But the same principles by which deeds may be admitted in evidence, without proof of their execution, may be applied to the power under which the deed purports to be executed: *Folman v. Emerson*, 4 Pick. 160, 162. To lay the foundation for secondary evidence, the destruction or loss of the instrument must first be shown, or that diligent search and inquiry has been made of those persons in whose custody the law presumes it to be, after it is shown once to have existed: *Corbin v. Jackson*, 14 Wend. 619, 627; *Jackson v. Frier*, 16 Johns. 196; and see *Green v. Chelsea*, 24 Pick. 71.

CONSTRUCTION AND EXECUTION OF POWER OF ATTORNEY. — Powers of attorney are, ordinarily, subjected to a strict construction. The authority must be strictly pursued, otherwise the principal will not be bound: *Rossiter v. Rossiter*, 8 Wend. 494; *Sanlford v. Handy*, 23 Id. 260; *Brantley v. Southern Life Ins. Co.*, 53 Ala. 554; *Equit. Life Assur. Soc. v. Poe*, 53 Md. 28; *Watson v. Hopkins*, 27 Tex. 637; compare *Peters v. Farnsworth*, 15 Vt. 155; *Wickham v. Knox*, 33 Pa. St. 71; *Sav. Fund Soc. v. Sav. Bank*, 36 Id. 498; S. C., 78 Am. Dec. 390. And a power of attorney executed jointly by husband and wife for the sale and conveyance of all their property, in which the words "we," "us," and "our" were consistently and exclusively used, was held not to authorize a sale and conveyance of property, the title to which was in the husband alone, in the absence of extrinsic proof of the non-existence of joint property: *Dodge v. Hopkins*, 14 Wis. 630. If two agents are appointed by separate instruments, with equal authority to act for the principal, the right is not exclusive in either, and any act done by either within the scope of his authority will conclude the other: *Cushman v. Glover*, 11 Ill. 600. But if an authority is given to two or more conjointly to do an act, all must concur in doing it, in order to bind the principal: *Woolsey v. Tompkins*, 23 Wend. 324; *Rollins v. Phelps*, 5 Minn. 463; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *White v. Davidson*, 8 Md. 169; compare *Cedar Rapids etc. R. R. Co. v. Stewart*, 25 Iowa, 115. And an agent or attorney who has a mere authority must execute it himself, and cannot delegate his authority to a subagent: *Lyon v. Jerome*, 26 Wend. 485; *McCormick v. Bush*, 38 Tex. 314; *Stinchcomb v. Marsh*, 15 Gratt. 202; *Brewster v. Hobart*, 15 Pick. 303. A power of attorney must be executed in the name of the person who gives it. The agent

er attorney is put in the place or stead of his principal, and is to act in his name: *Hunt v. Roumanier*, 8 Wheat. 174, 203. And the rule commonly laid down is, that a deed executed by an agent or attorney, to be valid must be made in the name of his principal: *Elwell v. Shaw*, 16 Mass. 42; *Brinley v. Mann*, 2 Cush. 337; the instrument must purport, on its face, to be the act and deed of the principal: *Id.*; *Stinchfield v. Little*, 1 Me. 231; *Hak v. Woods*, 10 N. H. 470; *Pentz v. Stanton*, 10 Wend. 271; and the signing by an attorney of the name of his principal to an instrument containing nothing to indicate that it is executed by attorney, and without adding his own signature as such, is held not to be a valid execution: *Wood v. Goodridge*, 6 Cush. 117; S. C., 52 Am. Dec. 771. The tenor of the instrument should clearly show that the principal is intended to be bound thereby, and that the agent acts merely as his agent in executing it: *Id.*; and see *Stackpole v. Arnold*, 11 Mass. 27; *Rice v. Gove*, 22 Pick. 158; *Forsyth v. Day*, 41 Me. 382; *Squier v. Norris*, 1 Lana. 282; *Kingsland v. Chetwood*, 39 Hun, 602, 604; *Avery v. Dougherty*, 102 Ind. 443; S. C., 52 Am. Rep. 680; *Byington v. Simpson*, 134 Mass. 169; S. C., 45 Am. Rep. 314. In Maine, if a deed is executed by an agent or attorney, with authority therefor, and it appears by the deed that it was the intention of the parties to bind the principal, it must be regarded as the deed of the principal, though signed by the agent or attorney in his own name: *Nobleboro v. Clark*, 68 Me. 87; S. C., 28 Am. Rep. 22.

If there be two grantors, and one of them acts as the attorney in fact of the other, he must subscribe his name twice, once as attorney in fact for the other and once for himself. One signature and a second seal is not equal to a second subscription: *Meagher v. Thompson*, 59 Cal. 189.

## SMITH v. STODDARD.

[10 MICHIGAN, 143.]

**DEDUCTION FOR UNLAWFUL INTEREST ACTUALLY PAID WILL NOT BE ALLOWED**, in favor of debtor, when suit is brought on a new security taken for the principal, and given upon a *bona fide* settlement of all the former transactions between the parties.

**NEW SECURITY, INCLUDING SUM FOR UNLAWFUL UNPAID INTEREST**, is so far without consideration, and liable to abatement to that extent.

**PLAINTIFF MAY RECOVER INTEREST ON USURIOUS CONTRACT UP TO HIGHEST LEGAL RATE** not prohibited by the statute, if such be the express terms of the contract.

THE opinion states the facts.

*Walker and Kent*, for the complainant.

*Knight and Jennison*, for the defendants.

BY COURT, CAMPBELL, J. This is a bill filed to foreclose a mortgage, and the defense of usury is set up. The mortgage in controversy is for \$549, and no usury is alleged to have exacted or agreed upon under it, but the transactions complained of were anterior. It appears that a loan of five hun-

dred dollars was made in November, 1856, and another of three hundred dollars in April, 1857, on both of which unlawful interest was paid. That in July, 1857, all the back interest was paid up, and the principal reduced to five hundred dollars, for which a new mortgage was given, the old securities being canceled. Subsequently, three hundred dollars of this principal was paid up, and unlawful interest was also paid in money from time to time. Additional loans of one hundred dollars and two hundred dollars were afterwards made in 1858, on which excessive interest was in like manner paid. On the 18th of July, 1859, this entire principal of five hundred dollars remained unpaid. The mortgage in controversy was, on that occasion, given for \$549, which was for the principal due, and for due-bills held by complainant for back interest. The old mortgage was released, and the new one given on a part only of the premises covered by that. Defendant Stoddard is the only borrower throughout.

These are the facts as we deduce them from the pleadings and evidence, and are all that we deem material to dispose of the case. There are several matters in proof which we have not referred to, because we do not regard them as important.

The mortgage in suit is a new security, given with its accompanying note upon a complete settlement of all the former transactions. The sum of five hundred dollars embraced in it is money actually lent by complainant to defendant. It includes no direct usury, because the principal had never been reduced or intended to be reduced; all payments which had been made having been expressly made upon interest. It appears that the usurious interest was always either paid in money or put in the shape of separate due-bills and amounts. We do not think, as to this sum of five hundred dollars, that there can be any deduction allowed. When parties have actually paid the usurious interest, and then come to a *bona fide* settlement, and make new securities which include nothing but an actual loan, and are not meant as mere evasions, we do not think the new contract can be regarded as either usurious in itself, or based on a usurious consideration. The statute does not contemplate the recovery back, or allowance of unlawful interest once paid, unless in a suit upon the contract under which it was exacted. A new security, between the same parties, embracing not only a valid debt, but also a claim for unpaid usurious interest, would undoubtedly be founded to that extent on a usurious consideration, and therefore liable to

abatement. But the abatement cannot, we think, under our statute, go further. The law does not absolutely avoid contracts for usury, and if parties completely perform them they are remediless.

The only question, therefore, is whether the sum of forty-nine dollars included in the mortgage is a valid indebtedness. It appears to have been made up entirely from due-bills for back interest. As the previous mortgage for five hundred dollars called for ten per cent on its face, and as the parties seem to have considered, although erroneously, that the three hundred dollars last loaned were secured by it, there was no interest which could be embraced in these due-bills, except the excess beyond ten per cent. This excess was not lawfully recoverable, and did not, therefore, make a valid consideration for the new securities. It must therefore be deducted.

It is claimed by the defendants that where usury is taken, the interest lawfully recoverable cannot exceed seven per cent, although ten per cent may be legally bargained for in other cases.

The statute allows only a deduction of that which exceeds what might be legally bargained for. Nothing is usury unless it exceeds ten per cent, and nothing but usury can be considered in reducing the judgment; or to speak more correctly, the plaintiff may always recover interest up to the highest legal rate not prohibited by the statute, if such are the express terms of the contract.

The decree must be so modified as to credit the defendants with forty-nine dollars, and interest at ten per cent from the date of the mortgage. They are also entitled to the costs of this court, but not of the court below.

The other justices concurred.

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**ACTION TO RECOVER MONEY PAID AS USURY:** *Davis v. Garr*, 55 Am. Dec. 393, note; *Baughers v. Nelson*, 52 Id. 702, note; *Nichols v. Bellows*, 54 Id. 85; *Rock River Bank v. Sherwood*, 78 Id. 669.

**NEGOTIABLE PAPER, WHEN USURIOUS IN INCEPTION:** *Catlin v. Gunter*, 62 Am. Dec. 113, and note; *Ayer v. Tilden*, 77 Id. 355.

**IF USURIOUS NOTE IS GIVEN FOR VALID PRE-EXISTING DEBT, it will not cancel the pre-existing debt:** *Parker v. Cousins*, 44 Am. Dec. 388.

**EXTENT OF RELIEF UPON USURIOUS CONTRACT:** *Baughers v. Nelson*, 52 Am. Dec. 694; *Zeigler v. Scott*, 54 Id. 395.

**EXISTENCE OF CORRUPT INTENT to take more than the law allows for the use of money is necessary to constitute usury:** *Condit v. Baldwin*, 78 Am. Dec. 137, and note.



THE PRINCIPAL CASE IS CITED to the point that usury in a contract, if not contained in a subsequent one as an integral part, will afford no ground for partial defense to an action upon the latter, either by way of payment, or of reduction of the amount for which judgment may be rendered, in *Collins Iron Co. v. Burkam*, 10 Mich. 289; *Gerlaugh v. Bassett*, 20 Wis. 678; it is cited to the point that where, in a new security, a sum is included for unlawful unpaid interest, the security to the extent of such unlawful interest is without consideration, and to such extent liable to abatement, in *Gardner v. Matteson*, 38 Mich. 203; and is cited to the point that the statutory requirement that stipulations for ten per cent interest shall be in writing does not apply where the contract clearly expresses the sum to be paid, in *Cameron v. Merchants' etc. Bank*, 37 Id. 244.

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## MAHER v. PEOPLE.

[10 MICHIGAN, 212.]

**ACTUAL INTENT TO KILL MUST BE FOUND, IN PROSECUTION FOR ASSAULT WITH INTENT TO MURDER,** and that under circumstances which would make the killing murder.

**MALICE AFORETHOUGHT AND ACT OF KILLING ARE ESSENTIAL INGREDIENTS IN OFFENSE OF MURDER,** and the presumption of innocence applies equally to them both, hence the burden of proof, as to each, rests equally upon the prosecution.

**LEGAL IMPORT OF TERM "MALICE AFORETHOUGHT" IS FOR COURT TO DEFINE;** but the question whether it existed or not, in the particular instance, is one of fact for the jury.

**OFFENSE IS MANSLAUGHTER ONLY, AND NOT MURDER,** if the homicide, though intentional, be committed under the influence of passion, or in heat of blood, and is the result of the temporary excitement by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition.

**TO REDUCE OFFENSE FROM MURDER TO GRADE OF MANSLAUGHTER,** the reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment.

**WHAT IS REASONABLE OR ADEQUATE PROVOCATION FOR SUCH STATE OF MIND** as should give to a homicide committed under its influence the character of manslaughter, is a question of fact for the determination of the jury.

**QUESTION WHETHER REASONABLE TIME HAD ELAPSED FOR PASSION TO COOL,** and reason to resume its control, is one of fact for the jury, depending upon all the circumstances of the particular case.

**STATEMENT OF PRISONER IN CRIMINAL CASE IS FOR CONSIDERATION OF JURY,** who may give it such credit, in whole or in part, as under all the circumstances they may deem it entitled to.

**STATEMENT OF EVIDENCE PROPOSED AND OFFERED BY DEFENDANT,** on trial of indictment for assault with intent to murder, held to have been erroneously rejected in this case. Manning, J., dissenting.

**THE opinion sufficiently states the case.**

*Buel and Trowbridge*, for the plaintiff in error.

*C. Upson*, attorney-general, for the people.

By Court, CHRISTIANCY, J. The prisoner was charged with an assault with intent to kill and murder one Patrick Hunt. The evidence on the part of the prosecution was that the prisoner entered the saloon of one Michael Foley, in the village of Houghton, where said Hunt was standing with several other persons; that prisoner entered through a back door and by a back way leading to it, in his shirt sleeves, in a state of great perspiration, and appearing to be excited; and on being asked if he had been at work, said he had been across the lake; that on entering the saloon, he immediately passed nearly through it to where said Hunt was standing, and on his way towards Hunt said something, but it did not appear what, or to whom; that as soon as the prisoner came up to where Hunt was standing, he fired a pistol at Hunt, the charge of which took effect upon the head of Hunt, in and through the left ear, causing a severe wound thereon; by reason of which Hunt, in a few moments, fell to the floor, was partially deprived of his sense of hearing in that ear, and received a severe shock to his system, which caused him to be confined to his bed for about a week, under the care of a physician; that immediately after the firing of the pistol, prisoner left the saloon, nothing being said by Hunt or the prisoner. It did not appear how, or with what, the pistol was loaded. The prisoner offered evidence tending to show an adulterous intercourse between his wife and Hunt on the morning of the assault, and within less than half an hour previous; that the prisoner saw them going into the woods together about half an hour before the assault; that on their coming out of the woods, the prisoner followed them immediately (evidence having already been given that prisoner had followed them to the woods); that on their coming out of the woods, the prisoner followed them, and went after said Hunt into the saloon, where, on his arrival, the assault was committed; that the prisoner on his way to the saloon, a few minutes before entering it, was met by a friend, who informed him that Hunt and the prisoner's wife had had sexual intercourse the day before in the woods. This evidence was rejected by the court, and the prisoner excepted. Was the evidence properly rejected? This is the main question in the case, and its decision must depend upon the question whether the proposed evidence would have tended to reduce the killing—had death

ensued—from murder to manslaughter, or rather to have given it the character of manslaughter instead of murder? If the homicide—in case death had ensued—would have been but manslaughter, then defendant could not be guilty of the assault with intent to murder, but only of a simple assault and battery. The question, therefore, involves essentially the same principles as where evidence is offered for a similar purpose in a prosecution for murder; except that, in some cases of murder, an actual intention to kill need not exist; but in a prosecution for an assault with intent to murder, the actual intention to kill must be found, and that under circumstances which would make the killing murder.

Homicide, or the mere killing of one person by another, does not, of itself, constitute murder; it may be murder, or manslaughter, or excusable or justifiable homicide, and therefore entirely innocent, according to the circumstances, or the disposition or state of mind or purpose which induced the act. It is not, therefore, the act which constitutes the offense, or determines its character; but the *quo animo*, the disposition, or state of mind, with which it is done. *Actus non facit reum nisi mens sit rea: People v. Pond*, 8 Mich. 150.

To give the homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice prepense or aforethought. This malice is just as essential an ingredient of the offense as the act which causes the death; without the concurrence of both, the crime cannot exist; and as every man is presumed innocent of the offense with which he is charged till he is proved to be guilty, this presumption must apply equally to both ingredients of the offense,—to the malice as well as to the killing. Hence, though the principle seems to have been sometimes overlooked, the burden of proof, as to each, rests equally upon the prosecution, though the one may admit and require more direct proof than the other; malice, in most cases, not being susceptible of direct proof, but to be established by inferences more or less strong, to be drawn from the facts and circumstances connected with the killing, and which indicate the disposition or state of mind with which it was done. It is for the court to define the legal import of the term, “malice aforethought,” or in other words, that state or disposition of mind which constitutes it; but the question whether it existed or not, in the particular instance, would, upon principle, seem to be as clearly a question of fact for the jury as any other fact in the cause, and

that they must give such weight to the various facts and circumstances accompanying the act, or in any way bearing upon the question, as in their judgment they deserve; and that the court have no right to withdraw the question from the jury by assuming to draw the proper inferences from the whole, or any part of the facts proved, as presumption of law. If courts could do this, juries might be required to find the fact of malice where they were satisfied, from the whole evidence, it did not exist. I do not here speak of those cases in which the death is caused in the attempt to commit some other offense, or in illegal resistance to public officers, or other classes of cases which may rest upon peculiar grounds of public policy, and which may or may not form an exception; but of ordinary cases, such as this would have been had death ensued. It is not necessary here to enumerate all the elements which enter into the legal definition of malice aforethought. It is sufficient to say that, within the principle of all the recognized definitions, the homicide must, in all ordinary cases, have been committed with some degree of coolness and deliberation, or at least under circumstances in which ordinary men, or the average of men recognized as peaceable citizens, would not be liable to have their reason clouded or obscured by passion; and the act must be prompted by or the circumstances indicate that it sprung from a wicked, depraved, or malignant mind,—a mind which, even in its habitual condition and when excited by no provocation which would be liable to give undue control to passion in ordinary men, is cruel, wanton, or malignant, reckless of human life, or regardless of social duty.

But if the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition,—then the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter.

To what extent the passions must be aroused and the dominion of reason disturbed to reduce the offense from murder to manslaughter, the cases are by no means agreed; and any

rule which should embrace all the cases that have been decided in reference to this point would come very near obliterating, if it did not entirely obliterate, all distinction between murder and manslaughter in such cases. We must therefore endeavor to discover the principle upon which the question is to be determined. It will not do to hold that reason should be entirely dethroned or overpowered by passion so as to destroy intelligent volition: *State v. Hill*, 4 Dev. & B. 491; *Haile v. State*, 1 Swan, 248; *Young v. State*, 11 Humph. 200. Such a degree of mental disturbance would be equivalent to utter insanity, and if the result of adequate provocation, would render the perpetrator morally innocent. But the law regards manslaughter as a high grade of offense,—as a felony. On principle, therefore, the extent to which the passions are required to be aroused and reason obscured must be considerably short of this, and never beyond that degree within which ordinary men have the power, and are therefore morally as well as legally bound to restrain their passions. It is only on the idea of a violation of this clear duty that the act can be held criminal. There are many cases to be found in the books in which this consideration, plain as it would seem to be in principle, appears to have been in a great measure overlooked, and a course of reasoning adopted which could only be justified on the supposition that the question was between murder and excusable homicide.

The principle involved in the question, and which I think clearly deducible from the majority of well-considered cases, would seem to suggest as the true general rule that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment.

To the question, What shall be considered in law a reasonable or adequate provocation for such a state of mind, so as to give to a homicide, committed under its influence, the character of manslaughter? on principle, the answer, as a general rule, must be anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them,—not such a provocation as must, by the laws of the human mind, produce such an effect with the certainty that physical effects follow from physical causes; for then the individual could hardly be held morally accountable. Nor on

the other hand, must the provocation, in every case, be held sufficient or reasonable, because such a state of excitement has followed from it; for then by habitual and long-continued indulgence of evil passions a bad man might acquire a claim to mitigation which would not be available to better men, and on account of that very wickedness of heart which in itself constitutes an aggravation both in morals and in law.

In determining whether the provocation is sufficient or reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard,—unless, indeed, the person whose guilt is in question be shown to have some peculiar weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition.

It is doubtless, in one sense, the province of the court to define what in law will constitute a reasonable or adequate provocation, but not, I think, in ordinary cases to determine whether the provocation proved in the particular case is sufficient or reasonable. This is essentially a question of fact, and to be decided with reference to the peculiar facts of each particular case. As a general rule, the court, after informing the jury to what extent the passions must be aroused and reason obscured to render the homicide manslaughter, should inform them that the provocation must be one, the tendency of which would be to produce such a degree of excitement and disturbance in the minds of ordinary men; and if they should find such provocation from the facts proved, and should further find that it did produce that effect in the particular instance, and that the homicide was the result of such provocation, it would give it the character of manslaughter. Besides, the consideration that the question is essentially one of fact, jurors, from the mode of their selection, coming from the various classes and occupations of society, and conversant with the practical affairs of life, are, in my opinion, much better qualified to judge of the sufficiency and tendency of a given provocation, and much more likely to fix, with some degree of accuracy, the standard of what constitutes the average of ordinary human nature than the judge, whose habits and course of life give him much less experience of the workings of passion in the actual conflicts of life.

The judge, it is true, must to some extent assume to decide upon the sufficiency of the alleged provocation, when the question arises upon the admission of testimony; and when it is



so clear as to admit of no reasonable doubt upon any theory that the alleged provocation could not have had any tendency to produce such state of mind in ordinary men, he may properly exclude the evidence; but if the alleged provocation be such as to admit of any reasonable doubt, whether it might not have had such tendency, it is much safer, I think, and more in accordance with principle, to let the evidence go to the jury, under the proper instructions. As already intimated, the question of the reasonableness or adequacy of the provocation must depend upon the facts of each particular case. That can, with no propriety, be called a rule (or a question) of law which must vary with and depend upon the almost infinite variety of facts presented by the various cases as they arise: See Stark. Ev., Am. ed. 1860, pp. 676-680. The law cannot, with justice, assume, by the light of past decisions, to catalogue all the various facts and combinations of facts which shall be held to constitute reasonable or adequate provocation. Scarcely two past cases can be found which are identical in all their circumstances; and there is no reason to hope for greater uniformity in future. Provocations will be given without reference to any previous model, and the passions they excite will not consult the precedents.

The same principles which govern, as to the extent to which the passions must be excited and reason disturbed, apply with equal force to the time during which its continuance may be recognized as a ground for mitigating the homicide to the degree of manslaughter, or in other words, to the question of cooling time. This, like the provocation itself, must depend upon the nature of man and the laws of the human mind, as well as upon the nature and circumstances of the provocation, the extent to which the passions have been aroused, and the fact whether the injury inflicted by the provocation is more or less permanent or irreparable. The passion excited by a blow received in a sudden quarrel, though perhaps equally violent for the moment, would be likely much sooner to subside than if aroused by a rape committed upon a sister or a daughter, or the discovery of an adulterous intercourse with a wife; and no two cases of the latter kind would be likely to be identical in all their circumstances of provocation. No precise time, therefore, in hours or minutes, can be laid down by the court as a rule of law, within which the passions must be held to have subsided and reason to have resumed its control, without setting at defiance the laws of man's nature and ignoring the



very principle on which provocation and passion are allowed to be shown at all in mitigation of the offense. The question is one of reasonable time, depending upon all the circumstances of the particular case; and where the law has not defined, and cannot, without gross injustice, define the precise time which shall be deemed reasonable, as it has with respect to notice of the dishonor of commercial paper. In such case, where the law has defined what shall be reasonable time, the question of such reasonable time, the facts being found by the jury, is one of law for the court; but in all other cases it is a question of fact for the jury; and the court cannot take it from the jury by assuming to decide it as a question of law without confounding the respective provinces of the court and jury: Stark. Ev., ed. of 1860, 768, 769, 774, 775. In *Rex v. Hayward*, 6 Car. & P. 157, and *Rex v. Lynch*, 5 Id. 324, this question of reasonable cooling time was expressly held to be a question of fact for the jury. And see Wharton's Crim. Law, 4th ed., sec. 990, and cases cited. I am aware there are many cases in which it has been held a question of law; but I can see no principle on which such a rule can rest. The court should, I think, define to the jury the principles upon which the question is to be decided, and leave them to determine whether the time was reasonable under all the circumstances of the particular case. I do not mean to say that the time may not be so great as to enable the court to determine that it is sufficient for the passion to have cooled, or so to instruct the jury, without error; but the case should be very clear. And in cases of applications for a new trial, depending upon the discretion of the court, the question may very properly be considered by the court.

It remains only to apply these principles to the present case. The proposed evidence, in connection with what had already been given, would have tended strongly to show the commission of adultery by Hunt with the prisoner's wife, within half an hour before the assault; that the prisoner saw them going to the woods together, under circumstances calculated strongly to impress upon his mind the belief of the adulterous purpose; that he followed after them to the woods; that Hunt and the prisoner's wife were, not long after, seen coming from the woods, and that the prisoner followed them, and went in hot pursuit after Hunt to the saloon, and was informed by a friend on the way that they had committed adultery the day before in the woods. I cannot resist the conviction that this would have

been sufficient evidence of provocation to go to the jury, and from which, when taken in connection with the excitement and "great perspiration" exhibited on entering the saloon, the hasty manner in which he approached and fired the pistol at Hunt, it would have been competent for the jury to find that the act was committed in consequence of the passion excited by the provocation, and in a state of mind which, within the principle already explained, would have given to the homicide, had death ensued, the character of manslaughter only. In holding otherwise, the court below was doubtless guided by those cases in which courts have arbitrarily assumed to take the question from the jury, and to decide upon the facts or some particular fact of the case, whether a sufficient provocation had been shown, and what was a reasonable time for cooling.

But there is still a further reason why the evidence should have been admitted. No other cause being shown for the assault, the proposed evidence, if given, could have left no reasonable doubt that it was, in fact, committed in consequence of the alleged provocation, whether sufficient or not; and all the facts constituting the provocation, or which led to the assault, being thus closely connected, and following each other in quick succession, and the assault itself in which they resulted, constituted together but one entire transaction. The circumstances which, in fact, led to the assault, were a part of the *res gestæ*, which the jury were entitled to have before them to show what was the real nature of the act, the *quo animo*, state of mind, and intention with which it was done. The object of the trial should be to show the real nature of the whole transaction, whether its tendency may be to establish guilt or innocence; but until the whole is shown which might have any bearing one way or the other, its tendency to establish the one or the other cannot be known. Any inference drawn from a detached part of one entire transaction may be entirely false. And for myself, I am inclined to the opinion that all the facts constituting the *res gestæ*, so far as the prosecuting counsel is informed of, and has the means of proving them, should, on principle and in fairness to the prisoner, be laid before the jury by the prosecution. They naturally constitute the prosecutor's case. And whenever it may appear evident to the court that but a part of the facts, or a single fact, has been designedly selected by the prosecution from the series constituting the *res gestæ*, or entire transaction, and that

the evidence of the others is within the power of the prosecutor, it would, I think, be the duty of the court to require the prosecutor to show the transaction as a whole: See, by analogy, *Regina v. Holden*, 8 Car. & P. 606; *Regina v. Stroner*, 1 Car. & K. 650; *Regina v. Chapman*, 8 Car. & P. 559; *Regina v. Orchard*, Id., note; Roscoe's Crim. Ev. 164. Until this should be done, it is difficult to see how any legitimate inference of guilt, or of the degree of the offense, can be drawn; as every reasonable hypothesis of innocence, or a lower degree of guilt, is not, it seems to me, excluded. Criminal prosecutions do not stand on the same ground, in this respect, as civil cases. In the latter no such presumption is to be overcome; nor is it necessary to exclude every other hypothesis than the one sought to be established: 3 Greenl. Ev., sec. 29. But however this may be, it was clearly competent for the defendant to show the rest of the transaction, whether known to the prosecution or not. I think, therefore, for the several reasons stated, the evidence offered was erroneously rejected.

After the evidence was closed, the prisoner was called by his counsel to make a statement under the statute. This statement went strongly to corroborate the facts offered to be shown by the evidence rejected. The prisoner's counsel requested the court to charge that the prisoner's statement was for the consideration of the jury; that they should receive it as evidence in the cause, and give it such credit as, under the circumstances, they believed it entitled to; which the court refused, and the prisoner's counsel excepted. But the court, in this connection, did charge that the statement could not be received in relation to matters of defense excluded by the court, the conduct of Hunt and the prisoner's wife; but that where there were facts and circumstances in relation to the commission of the offense, the jury might consider the prisoner's statement in considering the evidence, and give it such weight as they thought proper.

The only substantial error of the court, in relation to this "statement," is that which grew out of the exclusion of the evidence, and was the natural consequence of that error. All he intended to say was that the statement might be considered by the jury so far only as it had any bearing upon the case; but that so far as it related to the conduct of Hunt and the prisoner's wife, it had no such bearing. It was thus far erroneous; but in other respects substantially correct. It is of little consequence whether the statement be called evidence,

or by some other name. It is not evidence within the ordinary acceptation of that term, because not given under the sanction of an oath, nor is the prisoner liable for perjury or to any other penalty, if it be false; nor can a full cross-examination be enforced. Yet it is clear the jury have a right to give it such credit, in whole or in part, as under all the circumstances they may think it entitled to.

The judgment should be reversed, and a new trial granted.

MARTIN, C. J., and CAMPBELL, J., concurred.

MANNING, J., filed a dissenting opinion.

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DISTINCTION BETWEEN INTENT TO KILL AND INTENT TO MURDER: *Hall v. State*, 76 Am. Dec. 617; compare *Sarah v. State*, 61 Id. 544.

CRIMINAL EVIDENCE—BURDEN OF PROOF: *State v. Smith*, 54 Am. Dec. 578; *Hight v. United States*, 43 Id. 111.

MALICE AFORETHOUGHT, DEFINITION, ETC.: *Commonwealth v. York*, 43 Am. Dec. 373; *Commonwealth v. Webster*, 52 Id. 711; *State v. Hildreth*, 51 Id. 364; *McDaniels v. State*, 47 Id. 93; *McCoy v. State*, 78 Id. 520, 529, note.

WHAT PROVOCATION MITIGATES INTENTIONAL KILLING TO MANSLAUGHTER: *State v. Johnson*, 35 Am. Dec. 742; *State v. Hill*, 34 Id. 396; *McWhirt's Case*, *Ferguson's Case*, 46 Id. 196; *State v. John*, 49 Id. 396.

MANSLAUGHTER DEFINED: *Sutcliffe v. State*, 51 Am. Dec. 459; *Anthony v. State*, 33 Id. 143; *Commonwealth v. Webster*, 52 Id. 711.

CITATIONS OF THE PRINCIPAL CASE are as follows, and to the points stated: The burden of proof in a criminal case is upon the prosecution to establish the conditions of guilt: *People v. Garbutt*, 17 Mich. 22. And it is not only the right but the duty of the prosecution to show, generally, the transaction as a whole, its nature, and its objects, whether its tendency should be to show the guilt or innocence of the defendant: *Patten v. People*, 18 Id. 327; *People v. Marble*, 38 Id. 124; *Thomas v. People*, 39 Id. 312. The particular intent charged must be proved to the satisfaction of the jury, and no intent in law, or mere legal presumption, differing from the intent in fact, can be allowed to supply the place of the latter: *Roberts v. People*, 19 Id. 415. As to what provocation, and what degree of excitement or confusion of mind, will reduce a homicide to manslaughter, as well as the nature of the circumstances which will render it excusable: *People v. Lilley*, 43 Id. 527; *Hurd v. People*, 25 Id. 412. And as to the distinction between civil and criminal cases in regard to legal presumptions: *Hamilton v. People*, 29 Id. 193.

THE PRINCIPAL CASE IS DISTINGUISHED in *Bonker v. People*, 37 Mich. 8, and the principle deducible therefrom stated to be that "the prosecutor in a criminal case is not at liberty, like a plaintiff in a civil case, to select out a part of an entire transaction which makes against the defendant, and then to put the defendant to the proof of the other part, so long as it appears at all probable from the evidence that there may be any other part of the transaction undisclosed; especially if it appears to the court that the evidence of the other portion is attainable." It was further said that the case is "really aimed at a suppression of evidence, and does not decide that all the witnesses to a transaction must necessarily be called by the prosecution": Id.; and compare *Hurd v. People*, 25 Id. 405.

## COLUMBIA BANK v. JACOBS.

[10 MICHIGAN, 349.]

**OBJECT OF REGISTRY LAW IS TO PROTECT PURCHASERS IN GOOD FAITH for a valuable consideration against prior secret conveyances.**

**ATTACHING CREDITOR IS NOT PURCHASER WITHIN MEANING OF REGISTRY LAW, and cannot claim the benefit of its provisions until the property attached has been sold in pursuance of law, and has been purchased in by him.**

**IN CASE OF CONVEYANCE BY DEED ABSOLUTE, AND WRITTEN DEFEASANCE BACK BY GRANTEE, and the former is recorded, but the latter is not, such unregistered defeasance is not void under the Michigan statute (Comp. Laws, sec. 2751), except as to purchasers for a valuable consideration, without actual notice of its existence.**

**MICHIGAN STATUTE REQUIRING ATTACHMENT LEVY TO BE FILED IN REGISTRY OF DEEDS, in order to give it any force as a lien (see Comp. Laws, sec. 4751), contained no provision giving such lien priority over pre-existing rights of third persons.**

**INTEREST OF MORTGAGEE IN LANDS IS NOT SUBJECT TO ATTACHMENT.**

**THE opinion sufficiently states the case.**

*G. E. Hand*, for the complainant.

*C. I. Walker*, for the defendant.

By Court, MANNING, J. The bill is to remove a cloud on the title of Cyrus H. Jacobs to lands attached as his by complainant, before proceeding to sell the same on execution in the attachment suit; the alleged cloud consisting in a claim the defendant Rebecca S. Jacobs, wife of the said Cyrus H. Jacobs, has to the land in question, under a conveyance thereof to her by her husband, in nature of a post-nuptial settlement, or separate provision made for her by her husband. To entitle complainant to the relief asked, two things must be established: 1. An attachable interest in the land in question in Cyrus H. Jacobs previous to the conveyance to his wife; and 2. The invalidity of the post-nuptial conveyance, for the purpose stated, in a court of equity.

It appears from the pleadings and proofs that the lands attached were conveyed by George B. Russell and wife to Cyrus H. Jacobs, as security for ten thousand dollars Russell loaned of Jacobs,—Russell at the time giving his bond for the ten thousand dollars, and Jacobs executing and delivering to Russell a writing stating that the conveyance was given as security for the loan, and promising to reconvey the land on the payment of the ten thousand dollars and interest. The conveyance and defeasance taken together, and construed as one

instrument, are a mortgage, and nothing more. This is conceded; and the first of the two questions to be considered involves the effect to be given to an unregistered defeasance, where the property has been attached without actual notice to the attaching creditor of the defeasance.

The conveyance from Russell to Jacobs was recorded, but the defeasance was not; and the bank insists it had no knowledge of the existence of the defeasance when the land was attached, and that it therefore has a lien on the land for the payment of its debt, discharged of the defeasance, and of all rights growing up under it.

“When a deed purports to be an absolute conveyance in terms, but is made, or intended to be made, defeasible by force of a deed of defeasance, or other instrument for that purpose, the original conveyance shall not be thereby defeated or affected, as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance shall have been recorded in the registry of deeds of the county where the lands lie”: Comp. Laws, sec. 2751.

This section must be construed with the other sections in the same chapter, providing for the registry of conveyances of real estate, and must be understood as declaring all such deeds of defeasance or other instruments void when not recorded, against purchasers for a valuable consideration without actual notice of their existence. The registry law is for the protection of purchasers in good faith for a valuable consideration, against prior secret conveyances. It makes no mention of attaching or judgment execution creditors, who must stand on their common-law or statutory rights, independent of the registry statute. They are not purchasers within its meaning, and cannot claim the benefit of its provisions until the property attached or levied on has been sold, in pursuance of law, and has been purchased in by them. Then, and not before, they are purchasers within the statute, and entitled to all its benefits.

The attachment law provides that “real estate shall be bound, and the attachment shall be a lien thereon, from the time when it was attached, if a certified copy of the attachment, with a description of such real estate, shall be deposited in the office of the register of deeds in the county where the same is situated, within three days after such real estate was attached, otherwise such attachment shall be a lien thereon

only from the time when such certified copy shall be so deposited": Comp. Laws, sec. 4751.

This section, when it has been complied with, only gives the attaching creditor a lien on the land attached. Unlike the registry law, it in no circumstances gives such lien a priority over pre-existing rights, as its object is not like the registry law to protect purchasers, but to secure the property attached to satisfy any judgment the party suing out the attachment may afterwards obtain against the defendant in attachment. It is a lien to the same extent as a levy on the land with an execution would be a lien, provided a judgment is obtained in the attachment suit, and a bond has not been given for the release of the property, as provided for in the other sections of the act,—sections 4754, 4755, 4756. A lien to this extent was necessary to give effect to the attachment proceedings, which otherwise might be rendered nugatory by a sale of the property before judgment by the defendant in attachment. While the statute takes from the debtor his right to sell or make other disposition of the property to the prejudice of the attaching creditor, it in no way interferes with the previously acquired rights of third persons.

Jacobs's interest in the land attached, as shown by the defeasance, was that of a mortgagee, which is not attachable; and complainant, not being a purchaser for a valuable consideration without notice of the defeasance, is not in a position to question the validity of the transfer of the mortgage interest by Jacobs to his wife. It is unnecessary, therefore, for us to go into this part of the case, and improper that we should do so, if the rights of Mrs. Jacobs are to be drawn in question without the proper parties before us.

The decree of the court below dismissing the bill is affirmed, with costs.

MARTIN, C. J., and CAMPBELL, J., concurred.

CHRISTIANCY, J., was absent.

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LIEN OF ATTACHMENT—PRIORITY: See *Roberts v. Bourne*, 39 Am. Dec. 614; *Hepp v. Glover*, 35 Id. 206; *Kennon v. Ficklin*, 44 Id. 776; *Bigelow v. Toplis*, 60 Id. 264; *Holmes v. Hall*, 77 Id. 444.

THE PRINCIPAL CASE IS CITED to the points named in the following cases: A mere attachment levy does not give to the creditor any rights analogous to those of a *bona fide* purchaser, within the registry laws: *Millar v. Babcock*, 25 Mich. 138; *French v. De Bow*, 38 Id. 712. A record is not notice for any purpose when not made so by statute: Id. 711; *Burton v. Martz*, Id. 764. The registry laws specifically point out the danger to which the party failing



to record his title is exposed, and the courts cannot extend it by construction: *Smith v. Williams*, 44 Id. 244. Assignment for benefit of creditors is not avoided by a subsequent attachment levied before the assignment could be put on record: *Palmer v. Mason*, 42 Id. 153.

THE PRINCIPAL CASE IS DISTINGUISHED in *Atwood v. Bearss*, 45 Mich. 471, the latter holding that the sheriff's certificate of a sale on execution, when put upon record, is constructive notice to subsequent purchasers, under act 123, Public Acts 1875, although the act does not in express terms declare that such record shall be constructive notice. It is also observed that the court "do not understand the principal case as holding that the person bidding off the property at an execution sale would not be a purchaser until he had received a sheriff's deed, even if such question were material in the case": Id. 472.

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## TRUDO v. ANDERSON.

[10 MICHIGAN, 357.]

**BILL OF EXCEPTIONS IS REMEDY OF PARTY AGGRIEVED BY ANY RULING OF COURT ON TRIAL WITHOUT JURY**, which would affect the conclusions of fact, as upon the admission or rejection of evidence; but when the only error alleged is that the finding of facts does not support the judgment, no exceptions are necessary, as the finding itself becomes a part of the record, and presents the question as fully as it could be presented by exceptions.

**JUDGE'S FINDING OF FACTS SHOULD STATE CONCLUSIONS OF FACTS**, and not merely evidence tending to prove them.

**AMENDMENT OF ASSIGNMENT OF ERRORS WAS PERMITTED AT HEARING**, where the objection to the assignment was purely technical, and it was apparent that the defendant in error could not have been misled as to the question intended to be raised.

**AGENT IS NOT AUTHORIZED TO EXCHANGE PROPERTY** under a simple authority to sell the property.

**AGENT CANNOT RATIFY ACT DONE BY HIMSELF OR SERVANT BEYOND SCOPE OF AGENCY**, so as to bind the principal.

**OWNER OF PROPERTY MAY MAINTAIN REPLEVIN THEREFOR WITHOUT PREVIOUS DEMAND**, where the person in charge of the property disposes of it without authority, and notwithstanding the property is in the hands of a *bona fide* purchaser without notice of the real owner's title.

PLAINTIFF replevied of defendant a horse. The court tried the case without a jury, and found as facts that the plaintiff owned the horse in question in July, 1860; that he left it in charge of one McAlister to be sold, and that McAlister's servant exchanged it for another horse; that McAlister conditionally sold the horse so received in exchange (suspected by him to be stolen), and afterwards refunded the purchase-money to the buyer on assurance that the alleged owner's claim was "all right"; that the horse in question, after the above exchange, finally passed into the hands of the defendant, a *bona*

*fide* purchaser, and was replevied by the plaintiff; that after he was taken on the writ, and before service on the defendant, McAlister demanded the horse as his, but no other demand was made. The conclusion of law upon these facts was, that the transaction passed the title to the horse in question, unless the horse received in exchange was stolen, or unless the plaintiff disaffirmed the transaction; and the case fails to show that the horse received in exchange was stolen, and there is nothing in the case showing that the plaintiff disaffirmed the transaction. Also, that a demand by the plaintiff before action was indispensable. Judgment upon the finding was rendered for the defendant, and plaintiff assigned for error that the finding of facts and law by the court did not support the judgment entered. No exceptions were taken to the rulings of law embodied in the finding.

*Douglass and Andrews*, for the plaintiff in error.

*E. C. Hinsdale and C. A. Kent*, for the defendant in error

By Court, CHRISTIANCY, J. It is insisted by the counsel for the defendant in error that, as no exception was taken in the court below to the rulings of law embraced in the finding, this court will not now inquire into the propriety of anything in the decision.

Doubtless any ruling of law which might affect the finding of facts, as upon the admission or rejection of evidence, must be brought before the court by exception, as upon a trial before a jury. Such ruling of law would, in the language of the ninetieth rule of the circuit courts, be "embodied in the finding of facts." But when the only question is whether the facts found support the judgment, the general conclusion of law from all the facts found can with no propriety be said to be embodied in the finding of facts, but is merely the result to be deduced from it; and in such case, the finding of facts must, on principle as well as by the rule cited, be treated as a special verdict; and no exceptions are necessary, as the record itself presents the question as fully as it could be presented by exceptions. The object of the statute and of the rule was to give to the parties the same facilities for review in an appellate court, whether the trial at the circuit should be by the court or by a jury.

But it is urged that this decision is in conflict with the decision of this court in *Sweetzer v. Mead*, 5 Mich. 109. There is no such conflict. By reference to the record and the briefs

(neither of which appear in the report), it will be seen that there was a bill of exceptions setting out the evidence, to a small portion of which only exceptions were taken, as well as to the exclusion of other testimony offered. There was also a finding of facts by the court, and an amendment to the finding; and we were asked to pass upon the whole evidence, which would, in effect, have been a review of the judge's finding; and it was held that we could, in such case, only regard the exceptions taken at the trial, and the further question, whether the judgment conformed to the finding; in other words, whether the facts found authorized the judgment given. The language of the opinion cited by counsel has no reference to the particular question here involved.

But it is further objected on behalf of the defendant in error that the assignment of errors is not sufficient to raise the question, as upon a special verdict. The twelfth rule of this court requires all assignments of error to be special. The only assignments in this case are: 1. The general assignment; and 2. "That the written finding of facts and law by the circuit judge does not support the judgment." Technical accuracy would have required the assignment to be "that the finding of facts did not support the judgment." But on looking at the record and the assignment, we are satisfied such was the intention of the assignment, and that the defendant in error could not have been misled as to the question intended to be raised; and considering the objection as purely technical, we gave the plaintiff in error liberty to amend, or to have the record considered as amended. We must therefore consider the case upon the finding as upon special verdict.

The court found as a fact that the plaintiff, in July, 1860, was the owner of the horse in question; and to warrant the judgment in favor of the defendant, it must appear: 1. That the property, or the plaintiff's right of possession, had been divested; or 2. We must be satisfied that the court below was right in holding that a demand of the property was necessary before the institution of the suit. To authorize the judgment on the first ground, the court must have found, as a fact, the ratification by the plaintiff of the exchange made by the servant of his agent, and of the subsequent conditional sale by McAlister of the horse received in exchange; for the simple authority of McAlister to sell the horse for the plaintiff would not have authorized the exchange, if made by McAlister himself, much less when made by his servant; and the conditional

sale of the horse received in exchange could in no way bind the plaintiff, unless ratified and adopted by him. But while the finding sets forth the particular facts and circumstances in evidence with more particularity than necessary, and is therefore thus far more in the nature of evidence than of a finding of facts, it fails entirely to find directly the fact of ratification, or any fact, or state of facts, which would in law constitute such ratification. Certain facts are set forth in reference to a conditional sale made by McAlister of the horse received by his servant in exchange for the plaintiff's horse; but these facts, though probably with others considered by the judge as circumstances tending to the proof of ratification, cannot be treated as a finding of that fact by the court. If admissible, and sufficient to authorize the inference of ratification, they were certainly no more than mere evidence, and it was for him to draw the inference. A finding of facts should set forth the facts found, not merely the evidence tending to prove them. Upon a special verdict, the court can draw no mere inference of fact which the jury have failed to draw from the evidence. But we see nothing in this evidence which, without other facts not found, could even tend to the proof of ratification, as the plaintiff himself does not appear to have had any connection with the conditional sale, nor even to have been informed of it, either before or after the transaction. And an agent cannot ratify an act done by himself, or his servant, beyond the scope of the agency, so as to bind the principal; otherwise an agent might enlarge his own powers to any extent, without his principal's consent.

It remains only to inquire whether a demand was necessary before bringing suit. This must, we think, depend upon the question whether the taking by the defendant was lawful. The finding of facts sufficiently shows that the original taking by the party with whom the exchange was made by McAlister's servant was unlawful and wrongful, whether the horse given in exchange was stolen or not; as the servant who made it had no shadow of authority, but was a mere stranger to the plaintiff. The plaintiff had not given to his agent, McAlister, any *indicia* of ownership but the bare possession, to enable him as agent to sell the horse; but not even the possession was ever trusted by the plaintiff to the servant. The plaintiff, therefore, appears to have done no act, and to have been guilty of no negligence, calculated to mislead others, or to induce a belief that even McAlister (much less his servant) was the

owner, more than generally happens in the ordinary case of leaving property in the hands of an agent for sale. Had the ordinary mode of doing such business required any particular safeguard for the protection of third persons, which he had omitted, or done any act calculated to impose upon them, and others had been prejudiced by such act or omission, the case might have been different; but in the absence of all such proof, the taking by the person who received the horse in exchange being unlawful, those who received the possession and claim through such wrongful taker stand merely in his place, and can claim only in his right.

But the counsel for the defendant in error insists this principle does not apply to a purchaser in good faith and without notice, and that to render the defendant liable to a suit for the property, a previous demand should have been made. This exception to the principle just stated seems now to be established in the state of New York, as the cases cited by defendant's counsel sufficiently show; and the authority of these cases has been recently followed in Indiana: *Wood v. Cohen*, 6 Ind. 455. So far as the New York rule does not depend upon the distinction between replevin in the *cepit* and the *detinet*, it seems to rest upon the principle that "a man who innocently purchases property, supposing he should acquire a good title, ought not to be subjected to an action until he has an opportunity to restore the goods to the true owner."

The apparent equity of this rule would, on first view, seem to recommend it. But upon a careful examination, its justice, as a rule of law, will be found to be more apparent than real, as it must depend upon the peculiar circumstances of each particular case; and its injustice would be manifest if applied to a case where a previous demand would impose a serious inconvenience upon the plaintiff. It is not easy to give a satisfactory reason why the true owner, who has been guilty of no wrong or negligence, should be prejudiced by a transaction between the wrongful taker of his property and a third person, or how such transaction can impose upon him a new obligation. In many cases a previous demand would impose upon the owner a serious inconvenience, and in some cases might be equivalent to a denial of his right; and "if he happened to find in whose possession his property lies, a demand will perhaps raise an alarm, and hurry both the wrong-doer and the property beyond the plaintiff's reach": *Per Bowen, J., Barrett v. Warren*, 3 Hill, 360. Why should the right of the plaintiff

to recover his property be made to depend upon the good faith of the defendant, when that good faith is no defense against the plaintiff's right of property or possession when a previous demand has been made? The principle upon which the New York rule rests might properly have some weight with the court upon a question of costs, where these are discretionary, or might justify the legislature in refusing costs to the plaintiff where a previous demand could have been made without serious risk or inconvenience, and the suit has been brought without such demand. But we think the principle of the rule cannot properly be extended to the right of action.

We do not think the question of intent or good faith in a party receiving possession from a wrongful taker in such cases, and where the owner has been guilty of no wrong or negligence, can have any bearing upon the right of recovery in a civil suit for the property or its value; and such is clearly the weight of authority both in England and the United States: See cases cited by counsel for plaintiff in error, and opinion of Cowen, J., in *Barrett v. Warren*, 3 Hill, 360, and cases cited.

The taking in this case, as shown by the finding, was clearly a trespass, and would have constituted, of itself, a conversion in trover without proof of a demand and refusal. We can see no greater reason for a demand in an action of replevin under our statute. The New York Revised Statutes kept up, in the writ and declaration, the distinction between replevin in the *cepit* and that in the *detinet*; and this distinction seems to have been thought to have some bearing upon the question of a previous demand in such a case: See *Barrett v. Warren*, 3 Hill, 360; see also *Ingalls v. Bulkley*, 13 Ill. 315. It seems to have been thought that a defendant could not be said wrongfully to detain the property in such cases till he had refused to give it up on demand; and this is the ground taken by the defendant in error here. But the answer to this is, that our statute, so far as regards the form of action, recognizes no distinction between replevin for taking and that for detaining; but the action is, in form, in all cases for detaining only: Comp. Laws, secs. 5010, 5028. The declaration, therefore, will be supported, as well by proof of an unlawful or wrongful taking as of a wrongful detention.

The judgment must be reversed, and a judgment entered in this court for the plaintiff, for six cents damages and the costs of both courts.

The other justices concurred.

**BILLS OF EXCEPTION, WHAT TO CONTAIN, ETC.:** *Johnson v. Jennings*, 60 Am. Dec. 323, and note; *Duggins v. Watson*, Id. 560; *Pomroy v. Parmlee*, 74 Id. 328; how construed: *Perminter v. Kelly*, 54 Id. 177; *Donnell v. Jones*, 62 Id. 194.

**CONSTRUCTION AND EXTENT OF AGENT'S AUTHORITY:** *Wood v. McCain*, 42 Am. Dec. 612; *Upton v. Suffolk Co. Mills*, 59 Id. 163; *Toule v. Leavitt*, 55 Id. 195; *Joyce v. Duplessis*, 77 Id. 185; *Appleton Bank v. McGilvray*, 64 Id. 92; *Reitz v. Martin*, 74 Id. 215; *Sav. Fund Soc. v. Sav. Bank*, 78 Id. 390.

**WHEN DEMAND AND REFUSAL NOT NECESSARY IN ACTION OF TROVER:** *Buel v. Pumphrey*, 56 Am. Dec. 714; *Hyde v. Noble*, 38 Id. 508. Demand and refusal as evidence of conversion: *Hawkins v. Hoffman*, 41 Id. 767; *Mages v. Scott*, 55 Id. 49; *Dezell v. Odell*, 38 Id. 628.

**THE PRINCIPAL CASE IS CITED** to the first point stated in the *syllabus*, in the following cases: *Amboy etc. R. R. Co. v. Byerly*, 13 Mich. 442; *Peabody v. McAvoy*, 23 Id. 527; *Peck v. City Nat. Bank*, 51 Id. 360; and is cited to the second point stated in the *syllabus*, in *Thomas v. Sprague*, 12 Id. 123; *Yelverton v. Steele*, 40 Id. 540; *Downey v. Andrus*, 43 Id. 66; *Harle v. Westchester Fire Ins. Co.*, 29 Id. 417. It is cited to the point that the finding of facts is to be considered as in the nature of a special verdict, in *Burk v. Webb*, 32 Mich. 180; *Peck v. City Nat. Bank*, 51 Id. 360; to the point that a mere inference of fact, drawn from evidence, cannot be converted into matter of law by setting it up as such in the finding, in *Hogelskamp v. Weeks*, 37 Id. 425; to the point that the appellate court cannot supply omissions from a finding of fact, by inferences and presumptions, in *Briggs v. Parsons*, 39 Id. 404. So it is cited to the point that replevin will lie to recover, even from a *bona fide* purchaser, property which had been taken by the latter's vendor without the consent or authority of the owner, in *Parish v. Morey*, 40 Mich. 419; and to the point that the action cannot be defeated by a failure to make a prior demand, in *Le Roy v. East Saginaw City Railway*, 18 Id. 240; *Ballou v. O'Brien*, 20 Id. 324; *Whitney v. McConnell*, 29 Id. 14; *Adams v. Wood*, 51 Id. 414.

**THE PRINCIPAL CASE IS DISTINGUISHED** in *Campbell v. Quackenbush*, 33 Mich. 288; *Rodgers v. Brittain*, 39 Id. 479, holding that replevin would not lie, under the particular state of facts disclosed, without a prior demand.

**THAT AUTHORITY OF AGENT TO SELL GOODS** is not authority to exchange them in barter, see *Organ Company v. Starkey*, 59 N. H. 142.





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1. **CERTIFICATE OF ACKNOWLEDGMENT TO DEED IS TO BE SUSTAINED, IF POSSIBLE;** and in support of it, reference may be had to the instrument to which it is attached. *Touchard v. Crow*, 108.
2. **CERTIFICATE OF ACKNOWLEDGMENT TO DEED ATTESTED BY DEPUTY COUNTY CLERK,** with seal of court affixed, is sufficient to authorize the record of the deed, under laws providing that the acknowledgment must be taken by the clerk of a court having a seal, and that the county clerk is *ex officio* clerk of all courts having a seal, except the supreme court. *Id.*
3. **ACKNOWLEDGMENT OF MARRIED WOMAN TO MORTGAGE IS NOT CONCLUSIVE THAT HER CONSENT TO ITS EXECUTION WAS VOLUNTARY** and free, and not induced by fear. *Central Bank v. Copeland*, 597.
4. **OFFICER WHO TAKES ACKNOWLEDGMENT OF MORTGAGE OF MARRIED WOMAN CANNOT CONTRADICT** or impeach the certificate of acknowledgment. *Id.*

## ADVANCEMENTS.

**ADMINISTRATOR HAS NO INTEREST IN ESTABLISHING FACT OF ADVANCEMENT,** and cannot be said to be a party in interest. *Cecil v. Cecil*, 626.

## AGENCY.

1. **GENERAL AGENT CANNOT BIND PRINCIPAL BY SUBMISSION TO ARBITRATION,** without special authority to that effect. *Trout v. Emmons*, 326.
2. **AGENT IS NOT AUTHORIZED TO EXCHANGE PROPERTY** under a simple authority to sell the property. *Trudo v. Anderson*, 795.
3. **AGENT CANNOT RATIFY ACT DONE BY HIMSELF OR SERVANT BEYOND SCOPE OF AGENCY,** so as to bind the principal. *Id.*
4. **AGENT WHO CONTRACTS IN HIS OWN NAME MAY SUE ON CONTRACT,** but where he contracts in the name of his principal, the latter must sue. *Sharp v. Jones*, 359.

See CORPORATIONS, 13-18; NEGOTIABLE INSTRUMENTS, 15; TRUSTS, 2.

## ALIENS.

1. **WHERE TREATY INVESTS ALIENS** with an interest in lands, in certain cases, provided it is asserted within three years after the right accrues, their right is inviolable during such time, but after this, the state may deny such right to that class of persons. *Yeaker v. Yeaker*, 530.
2. **ALIEN CANNOT INHERIT LANDS** in Kentucky; but an alien friend who has resided within the state two years is entitled to receive, hold, and pass any right to land within the commonwealth during the continuance of his residence after that period. *Id.*

3. WHERE SUBSEQUENT ATTACHING CREDITOR INTERVENES IN ACTION FOR PURPOSE OF SETTING ASIDE PRIOR ATTACHMENT OF PLAINTIFF IN SUCH ACTION, on the ground that it was fraudulently taken out, the intervenor occupies the position of a defendant, and the burden of proof is upon the plaintiff. *Id.*
4. WORDS SPOKEN OR DECLARATIONS MADE BY ATTACHMENT PLAINTIFF LONG AFTER ISSUANCE OF ATTACHMENT, without evidence to show that such declarations related directly to the act of suing out the writ, are inadmissible in action on attachment bond as tending to prove malice in procuring the writ. *Burton v. Knapp*, 465.
5. INTRODUCTION BY DEFENDANT IN ACTION ON ATTACHMENT BOND OF EVIDENCE OF PLAINTIFF'S INSOLVENCY at the time of the issuance of the attachment is no ground for complaint by the plaintiff, where the plaintiff first introduced evidence of his solvency, and the court afterwards ruled out all the testimony on the subject. *Id.*
6. PLAINTIFF IN ACTION FOR WRONGFULLY SUING OUT ATTACHMENT MUST SHOW that the defendant had not good cause for believing the facts to be true upon which he based his affidavit for the writ; and it is not sufficient to show that, as a matter of fact, they were not true. *Id.*
7. ATTACHING CREDITOR IS NOT PURCHASER WITHIN MEANING OF REGISTRY LAW, and cannot claim the benefit of its provisions until the property attached has been sold in pursuance of law, and has been purchased in by him. *Columbia Bank v. Jacobs*, 792.
8. MICHIGAN STATUTE REQUIRING ATTACHMENT LEVY TO BE FILED IN REGISTRY OF DEEDS, in order to give it any force as a lien (see Comp. Laws, sec. 4751), contained no provision giving such lien priority over pre-existing rights of third persons. *Id.*

See CORPORATIONS, 22-26.

#### ATTORNEY AND CLIENT.

1. IN ACTION AGAINST ATTORNEY FOR MONEY COLLECTED BY HIM and not paid over to his client, a demand must be alleged and proved, or circumstances that would dispense therewith. *Black v. Hereck*, 362.
2. ATTORNEY MAY TESTIFY THAT HE BROUGHT SUIT FOR CERTAIN FIRM, recovered judgment, collected the money, and paid it over to a person to whom he was directed to pay it, by the letter and assignment of one of the firm. The facts are not privileged communications from his clients. *Fulton v. Maccracken*, 620.

#### BAIL.

1. ADMISSION TO BAIL IS RIGHT OF ACCUSED which no judge or court can properly refuse, except in capital cases where the proof is evident or the presumption great. *People v. Tinder*, 77.
2. STATUTE MAKING ADMISSION TO BAIL MATTER OF DISCRETION, in all cases where the punishment is death, would conflict with the California constitution, in so far as it affected cases other than those where the proof is evident or the presumption great. *Id.*
3. INDICTMENT FOR CAPITAL OFFENSE FURNISHES OF ITSELF PRESUMPTION OF GUILT too great to entitle defendant to bail as a matter of right under the California constitution, or as a matter of discretion under the state legislation in that regard. *Id.*
4. FINDING OF GRAND JURY CANNOT BE REVIEWED ON APPLICATION FOR BAIL in capital cases, as no provision is made by statute for preserving

the testimony taken before such jury, and particularly as the disclosure of such testimony, except in certain named cases, is impliedly prohibited. *Id.*

5. PRESUMPTION OF GUILT ARISING FROM INDIOTMENT IN CAPITAL CASES, on application for bail, cannot be rebutted by affidavits or oral testimony as to the guilt or innocence of the accused, except under special and extraordinary circumstances, and malice or mistake in the institution of the prosecution cannot be considered as such a circumstance. *Id.*
6. WHAT ARE CIRCUMSTANCES OF EXTRAORDINARY CHARACTER ON APPLICATION FOR BAIL in capital case, after indictment, as will justify the consideration of evidence offered to rebut the presumption of guilt arising from the indictment, stated. Among such are the existence, at the time of the indictment, of great popular excitement against the prisoner likely to bias or warp the judgment of the grand jurors; the existence of the party charged to have been murdered; or a clear confession of guilt by another. *Id.*
7. BAIL MAY SOMETIMES BE ALLOWED IN CAPITAL CASES AFTER INDIOTMENT, though no special or extraordinary circumstances exist; as where the public prosecutor admits that under the evidence obtainable, no conviction of a capital offense can be had; or where on the trial the jury have disagreed; or where, after verdict, a new trial has been granted on the ground of insufficiency of the evidence to sustain the verdict of guilty. In such cases the court may, in its discretion, without further evidence of the guilt or innocence of the accused, allow bail. *Id.*
8. IN CAPITAL CASE, AFTER INDIOTMENT, BAIL MAY SOMETIMES BE ALLOWED, independently of the merits of the prosecution, as where the trial is unreasonably delayed or postponed from term to term, even upon sufficient reasons; or where an event happens which ends or postpones indefinitely the further prosecution of the proceeding, as by repeal of the statute giving jurisdiction to try the indictment, without conferring the jurisdiction on another tribunal, or where the law creating the offense charged has been repealed without a reservation of the penalty for past offenses. *Id.*
9. IN ACTION ON FORFEITED RECOGNIZANCE, IT IS SUFFICIENT TO SET IT OUT IN *HÆC VERBA*. The recognizance need not be signed by the parties; it is witnessed by the record, and not by the signature of the party bound. *Campbell v. State*, 363.
10. DEFENDANT IN CRIMINAL PROSECUTION MAY BE CALLED, AND HIS RECOGNIZANCE FORFEITED, while a motion for a new trial is pending. *Id.*
11. DEFENDANT RECOGNIZED TO APPEAR AND ANSWER INDIOTMENT, who is convicted thereunder of a lesser offense than that charged, is still bound to appear, abide the order of the court, and not depart without leave. *Id.*

#### BAILMENTS.

**HIRE OF HORSE, WHO BY IMPROPER FEEDING AND WATERING MAKES HIM SICK**, and returns him in that condition to his owner, is liable for his full value, if the owner, by the use of reasonable care and the employment of a suitable veterinary surgeon, who treated him according to his best judgment, was unable to cure him, although the treatment was in fact improper and contributed to the horse's death. *Hastman v. Sawtern*, 677.

See BANKS AND BANKING; TELEGRAPHS, 2.

## BANKS AND BANKING.

1. BANK AND DEPOSITOR ARE BAILEE AND BAILOR, where funds are deposited in the bank to be held and returned in the same bills or coin. *Marine Bank v. Chandler*, 249.
2. BANK AND DEPOSITOR ARE DEBTOR AND CREDITOR, where funds are deposited in the bank to be used in the usual course of the banking business. *Id.*
3. BANK RECEIVING BANK BILLS FROM DEPOSITING CREDITOR must account for the same at par, though they were depreciated in value both at the time received and afterwards. *Id.*
4. SPECIAL LOCAL CUSTOM OF BANKERS REGARDING VALUE OF BANK BILLS CANNOT CHANGE the values fixed by law; such change can only be made by special agreement. *Id.*
5. RECEIPT OF DEPRECIATED CURRENCY BY SOME BUSINESS MEN, in payment of demands, does not prove that all creditors in the locality have agreed to receive the same. *Id.*
6. GENERAL AGREEMENT TO RECEIVE DEPRECIATED PAPER IN BUSINESS TRANSACTIONS may be abandoned by common consent of the parties, and after abandonment, one abandoning party cannot hold the other to it. *Id.*
7. DEPOSITOR MAY DRAW HIS CHECK ON HIS BANKER AT PLEASURE, in the regular course of business, either for the full amount of his deposit or for any part thereof, and the holder of a check may sue for and recover the amount expressed therein. *Chicago Marine etc. Ins. Co. v. Stanford*, 270.
8. CHECKS SHOULD BE DRAWN BY DEPOSITOR IN GOOD FAITH, and not for the mere purpose of vexation outside the regular course of business. *Id.*
9. OWNER OF BANK BILLS INCAPABLE OF BEING DISTINGUISHED from other similar bills cannot maintain an action against the bank that issued them, upon merely circumstantial evidence that they have been destroyed, and the tender of a bond of indemnity. *Tower v. Appleton Bank*, 635.

See EVIDENCE, 10.

## BETS.

See WAGERS.

## BONDS.

1. SURETY ON OFFICE BOND WILL NOT BE LIABLE if the names put upon the bond before his own are forgeries. *Seely v. People*, 234.
2. BOND, HOWEVER DEFECTIVE, EXECUTED FOR PURPOSE OF STAYING EXECUTION or on an appeal, and which is accepted for such purpose by the officer, will have the effect of binding all the parties executing it, and will stay the execution until the court shall quash the bond. *Ward v. Buell*, 349.
3. WHERE BOND ON APPEAL SPECIFIES NO AMOUNT, OR CONTAINS NO PENALTY, the law will hold the obligors in it liable to the extent required by the statute upon an appeal and *superedeas*, on the ground of intention in the parties executing it to render themselves liable to that extent. *Id.*
4. SURETIES ON APPEAL BOND MAY EXPRESSLY LIMIT AMOUNT OF THEIR LIABILITY; and if they do so, and the officer accepts it, they will not be bound beyond the amount named; but if that amount proves insufficient, the officer will be liable for the deficiency. *Id.*

See ATTACHMENTS, 4, 5; INJUNCTIONS, 2.

**BOUNDARIES.**

See TORTS, 1; VENDOR AND VENDEE, 4-6.

**BUILDING AND LOAN SOCIETIES.**

**Act of 1857, CONCERNING BUILDING LOAN FUND AND SAVINGS ASSOCIATIONS IS CONSTITUTIONAL**, and so far as it relates to such associations organized before its passage, it merely affects remedies, and does not vary liabilities or divest vested rights. *Stein v. Indianapolis Building etc. Association*, 353.

**BURGLARY.**

See CRIMINAL LAW, 7.

**CARE.**

See NEGLIGENCE.

**CARRIERS.**

See COMMON CARRIERS; TELEGRAPHS, 2; WAREHOUSES.

**CERTIFICATES OF DEPOSIT.**

See NEGOTIABLE INSTRUMENTS, 1; STATUTE OF LIMITATIONS, 6.

**CHATTEL MORTGAGES.**

See MORTGAGES, 27-31.

**CHECKS.**

See BANKS AND BANKING, 7, 8; NEGOTIABLE INSTRUMENTS, 4, 6.

**CHOSES IN ACTION.**

See ASSIGNMENTS.

**CLAIMS.**

See ESTATES OF DECEDENTS, 2, 3.

**COMMON CARRIERS.**

1. ONE WHO HAS BEEN EMPLOYED BY RAILROAD COMPANY, but who, in pursuit of his private business, takes passage on the cars of the company, is a passenger, though no fare is collected from him. *Ohio etc. R. R. Co. v. Muhling*, 336.
2. LIABILITY OF PASSENGER CARRIER IS NOT AFFECTED BY FACT THAT NO FARE IS COLLECTED from the injured passenger; the only inquiry is, whether or not he was lawfully on the train. *Id.*
3. RAILROAD COMPANY CARRYING PASSENGERS ON CONSTRUCTION TRAINS must be held to the same degree of diligence as when regular passenger coaches are used. *Id.*

See RAILROADS, 4.

**CONFLICT OF LAWS.**

See INTERNATIONAL LAW.

## CONSTITUTIONAL LAW.

1. ACT IS NOT INVALID by reason of its having been approved on a day after the act of Congress admitting Kansas into the Union. *State v. Hitchcock*, 503.
2. SECTION 17, ARTICLE 2, OF KANSAS CONSTITUTION, providing that, "in all cases where a general law can be made applicable, no special law shall be enacted," recognizes the necessity of some special legislation, and seeks only to limit, not prohibit it. It also leaves to the discretion of the legislature to determine whether their purpose can or cannot be expediently accomplished by a general law, and no special law will be declared invalid merely because it would, in the opinion of the court, have been possible to frame a general law under which the same purpose could have been accomplished. *Id.*
3. TERRITORIAL OFFICERS, ON ADMISSION OF KANSAS as a state, became *ad interim* state officers. They could do no act prohibited by the constitution to regulate state officers of like functions, but were not obliged to follow the mode of procedure in the transaction of public business prescribed for the regular officers of the state government. *Id.*
4. TERRITORIAL LEGISLATURE OF KANSAS, BEING IN SESSION when the act of admission was past, had power to continue in the discharge of the duties of that department until superseded, according to the mode of procedure prescribed in the organic act, and the laws so passed were valid, provided they were not in conflict with the constitution of the United States or the state. *Id.*
5. CONSTITUTION OF KANSAS DOES NOT REQUIRE a record to be kept of the presentation of a bill to the governor for approval; but if it did, the fact that such directory provision as to a formal step was not complied with could not affect the validity of the law. *Id.*
6. WHERE GOVERNOR APPROVES BILL, and the constitution does not require that he should notify either house of the legislature of the fact, or that such notification, if made, should be entered on the journals. The date being no necessary part of the approval, it will be presumed that the bill was signed between the date of its passage and the final adjournment of that session of the legislature. *Id.*
7. OWNER OF BONDS IN INTERNAL IMPROVEMENT FUND, issued by virtue of the Florida act of January 6, 1855, and known as the "Internal Improvement Act," may enjoin the trustees of such fund from applying it to any other purposes than those specified in the act, so as to endanger his claim by lessening his security; even though such application should be under the command of a subsequent act of the legislature. *Trustees v. Bailey*, 194.
8. LEGISLATURE CAN CONSTITUTIONALLY PASS NO ACT impairing the obligation of contracts, and when it attempts to do so, it is the solemn duty of the judicial department to declare such law null and void. *Id.*
9. WHEN LAW IS IN ITS NATURE a contract, and when absolute rights have vested under it, a repeal of the law cannot divest those rights. *Id.*
10. LEGISLATURE MAY BY ACT convey in trust, pledge, or mortgage, for the benefit of those who may aid in the construction of certain "internal improvements," a fund already existing and possessed by the state. It is not necessary to designate in the act all of the improvements to be aided by such fund; some may be mentioned and others postponed until those first designated are put into successful operation. The trustees of the fund created by the act cannot be heard to impeach it. *Id.*

- 12. LEGISLATURE MAY MAKE VOID ACT VALID BY CURATIVE STATUTE**, where it is not restrained by constitutional provisions; and it may therefore by such a statute validate the proceedings of a term of court holden without authority of law. *Walpole v. Elliott*, 358.

See EMINENT DOMAIN; TREATIES.

### CONSTRUCTION.

See STATUTES.

### CONTINUANCE.

See PLEADING AND PRACTICE, 30.

### CONTRACTS.

1. **WHERE THERE IS NO PRIVITY BETWEEN PARTIES, THERE CAN BE NO LIABILITY** one to the other. Thus where A and B separately have cattle sold by the same broker, and A is paid too much, and B the same amount too little, B cannot recover his deficit of A. *Hall v. Carpen*, 234.
2. **NO ACTION LIES ON AGREEMENT TO PAY FOR TUITION** for a specified time, if during the whole of such time the promisor was prevented by illness from attending or receiving the tuition. *Stewart v. Loring*, 747.
3. **EXPRESS AND IMPLIED CONTRACT FOR SAME THING** cannot exist at the same time. *Walker v. Brown*, 287.
4. **AFTER PERFORMANCE, PLAINTIFF MAY RECOVER ON SIMPLE CONTRACT** the price of the service, under an *indebitatus assumpsit*, but the contract must regulate the amount of the recovery. *Id.*
5. **RIGHT TO BRING INDEBITATUS ASSUMPSIT FOR MONEY DUE ON EXECUTED CONTRACT** does not entitle the party to set aside the contract and sue on a *quantum meruit*. *Id.*
6. **WHERE WORK AND LABOR IS PERFORMED UNDER CONTRACT**, suit must be between the parties to the contract; and third persons, though benefited by the work, cannot be sued upon an implied *assumpsit* to pay for that benefit. *Id.*
7. **IMPLIED UNDERTAKING CANNOT ARISE**, as against one benefited by work performed, when such work was done under a special contract with other persons. *Id.*
8. **TO CONSTITUTE LIABILITY ON IMPLIED CONTRACT, WHERE WORK IS PERFORMED BY ONE** the benefit of which is received by another, there must not only be no restrictions imposed by law upon the party sought to be charged against making in express terms a similar contract to that which is implied, but the party must also be in a situation where he is entirely free to elect whether he will or will not accept of the work, and where such election will or may influence the conduct of the other party with reference to the work itself. *Zottman v. San Francisco*, 96.
9. **MERE RETENTION AND USE OF BENEFIT RESULTING FROM WORK**, where the party is not free to elect whether or not to accept the work, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment. *Id.*
10. **DURESS WILL AVOID CONTRACT**, at law or in equity. *Central Bank v. Copeland*, 597.
11. **EQUITY WILL NOT ENFORCE CONTRACT AGAINST ONE WHO, ALTHOUGH ACTING VOLUNTARILY, yet in fact appears to have executed the contract**



with a mind so subdued by harshness, cruelty, extreme distress, or apprehensions short of legal duress, as to overpower and control the will. *Id.*

See AGENCY, 4; CORPORATIONS; EQUITY, 3; INSURANCE; TENDER; USURY.

### CONVEYANCES.

See DEEDS.

### CORPORATIONS.

1. CONTRACT WITH CORPORATION DOES NOT ESTOP PARTY MAKING IT TO DISPUTE EXISTENCE OF CORPORATION, if there be no law which authorized the supposed corporation, or if the statute authorizing it be unconstitutional and void. *Snyder v. Studebaker*, 415.
2. CONTRACT WITH CORPORATION WILL ESTOP PARTY MAKING IT TO DISPUTE ORGANIZATION, or the legal existence of the corporation, if there be a law which authorized the corporation. *Id.*
3. EXISTENCE OF CORPORATION IS IMPLIED WHERE IT CONTRACTS BY STYLE which is usual in creating corporations, and which discloses no individuals, and such existence need not be alleged in a complaint by the corporation. *Stein v. Indianapolis Building etc. Ass'n*, 358.
4. CHARACTER OF CORPORATION, WHETHER PRIVATE OR PUBLIC, depends upon the purposes for which it was formed, and the powers conferred upon it, and not upon the character of its stockholders. It does not alter its character that the state or the United States owns a portion of its stock. *Bardstown etc. R. R. Co. v. Metcalfe*, 541.
5. RULES OF CONSTRUCTION WHICH APPLY TO CHARTERS delegating sovereign powers to corporations do not depend upon the question whether they are public or private. They depend on the character of the powers conferred, and the purposes of their organization. *Id.*
6. POWER OF RAILROAD OR OTHER PRIVATE CORPORATION to take private property for its use, being a delegation of sovereign power, must be construed as it would be if delegated to a municipal corporation; whilst the powers of private and public corporations with respect to their property are governed by the same principles, and in the absence of express provisions of law, depend upon the purposes for which the corporation was formed. *Id.*
7. GENERALLY, PRIVATE CORPORATION HAS IMPLIED POWER to do whatever may be necessary to execute its express powers, and to accomplish the purposes for which it was formed. *Id.*
8. RAILROAD CORPORATION EXPRESSLY AUTHORIZED to borrow money with which to construct its road, but not expressly authorized to make a mortgage for the payment of such money, has an implied power to do so, but cannot mortgage its corporate existence, or any prerogative franchise conferred upon it. The right to build and use the road is not, however, a prerogative franchise, and a purchaser under the mortgage would take the road subject to the terms of the charter designed to protect the public, and would be fully bound thereby. *Id.*
9. MORTGAGE BY RAILROAD COMPANY to secure money borrowed for the construction of its road is not opposed to the public policy of Kentucky. This is indicated by the general course of legislation upon the subject. *Id.*
10. WHERE RAILROAD CORPORATION VOLUNTARILY MORTGAGES ITS PROPERTY to secure money which it is expressly authorized to borrow, and

the bond-holders invest their money upon the faith of the mortgage, this is sufficient to take the case out of the rule that a turnpike road cannot be sold for a general debt of the corporation. *Id.*

11. RESOLUTION OF DIRECTORS OF RAILROAD CORPORATION authorizing a mortgage of "the road and its property, etc.," is sufficient to authorize a mortgage of the "railroad, with all its rights and privileges," as there was nothing to which the phrase "etc." could have been designed to apply except the franchises, and therefore must have been used to embrace them. *Id.*
12. RESOLUTION OF DIRECTORS OF RAILROAD CORPORATION authorizing a mortgage of the road and its property must design a transfer of the right to operate the road. *Id.*
13. PRESIDENT OF CORPORATION HAS NO AUTHORITY AS SUCH TO MAKE CONTRACTS binding upon the corporation, except as to matters arising in the ordinary course of the business of the corporation. *Blen v. Water and Mining Co.*, 132.
14. PRESIDENT OF CORPORATION HAS NO AUTHORITY TO BIND CORPORATION BY CONTRACT for purchase of land to be used in extending the operations of the corporation, as this is not a matter within the ordinary course of the business of the corporation. *Id.*
15. RATIFICATION BY CORPORATION OF CONTRACT MADE BY PRESIDENT WITHOUT AUTHORITY must be made with full knowledge of the terms of the contract. *Id.*
16. RATIFICATION AMOUNTS IN ITSELF TO PRESUMPTIVE EVIDENCE OF EVERYTHING NECESSARY TO SUSTAIN IT; it supposes a knowledge of the thing ratified, and in the case of a contract, that its terms were known; and if there was any mistake or misapprehension, that fact must be shown. *Id.*
17. RATIFICATION BY BOARD OF TRUSTEES OF CORPORATION OF CONTRACT FOR PURCHASE OF LAND, made without authority by the president, who was also one of the trustees, will be presumed to have been made with full knowledge of the terms of the contract, where the president participated in the meeting at which the ratification was made, and made a written report, which stated partially, but not fully, the terms of the contract, which report and proceedings the trustees, by a vote, ratified. The mere fact that the report did not state all the terms of the contract is no evidence that the board was ignorant upon the subject. And from the fact of the presence of the president at the meeting it may be inferred that the trustees were fully informed. *Id.*
18. FALSE REPRESENTATION BY AGENT OF CORPORATION AS TO ITS RIGHTS UNDER CHARTER ARE INSUFFICIENT TO AVOID CONTRACT OF SUBSCRIPTION to its capital stock. The representation is upon matter of law. *Parker v. Thomas*, 385.
19. FALSE REPRESENTATIONS WILL NOT AVOID CONTRACT OF SUBSCRIPTION TO CAPITAL STOCK OF RAILROAD COMPANY, when they are in respect to such matters as the ability of the company to construct the road, and the time within which it would be done. *Id.*
20. FALSE REPRESENTATIONS WILL NOT AVOID CONTRACT OF SUBSCRIPTION TO CAPITAL STOCK OF CORPORATION, unless the subscriber believed or relied upon them, or his subscription was in some degree induced by them. *Id.*
21. CONDITION IN SUBSCRIPTION TO CAPITAL STOCK OF RAILROAD COMPANY THAT ROAD SHOULD BE LOCATED within a certain distance of a specified

- place, is a condition precedent; and its performance is not waived by the giving of unconditional notes for the subscription, unless so intended by the parties. *Id.*
22. **SHARES IN STOCK OF CORPORATION** are subjects of sale, mortgage, or pledge, and are liable to attachment and execution, like other personal property. *Colt v. Ives*, 161.
23. **WHEN QUESTION CONCERNING SHARES IN STOCK OF CORPORATION** is between a vendee and an attaching creditor of the vendor, as to which has the better title, and it appears that an instrument of transfer or assignment was executed prior to the service of the attachment, then if the vendee's purchase was made in good faith and for a valuable consideration, in equity his title will prevail; provided he has done all the law requires of him, and all that it is possible for him to do in taking possession, such as the nature of the property is susceptible of. *Id.*
24. **GROUND ON WHICH STOCK SOLD** but not legally transferred is open to attachment by the creditors of the vendor, is the same as that upon which personal chattels sold but retained in the possession of the vendor are liable to attachment by the vendor's creditors, and facts which will excuse the retention of chattels will excuse defects in the transfer of the stock. *Id.*
25. **WHERE VENDOR OF STOCK HAS MADE EFFORT** to get the assignment perfected on the transfer books of the corporation, and on failure to accomplish this has made an effort to make the assignment as notorious as possible, using not only due diligence but all possible diligence, his retention of possession is exempted from the condemnation of the law, and a perfect equitable title vests in his vendee, which will be protected as against subsequent attaching creditors of the vendor. *Id.*
26. **WHEN UTMOST DILIGENCE HAS BEEN USED** by both purchaser and vendor to make the sale and delivery of stock as complete as possible, the rights of an attaching creditor of the vendor will not be placed above those of the *bona fide* purchaser. *Id.*
27. **WHERE OWNER OF CERTIFICATE OF SHARES IN CORPORATION SELLS PART OF THEM**, and executes an assignment of the part so sold by partially filling up a blank form printed on the back of the certificate, being guilty of no want of care in the mode of filling the blank, and this assignment is afterwards altered so as to purport to assign the whole of the shares, and the corporation negligently transfers all the shares on its books, and issues to other parties a new certificate therefor, it will be liable to the true owner for the amount of shares thus wrongfully transferred. *Sewall v. Boston Water Power Co.*, 701.
28. **MUNICIPAL CORPORATION CANNOT PASS IRREVOCABLE ORDINANCE.** It cannot abridge its own legislative powers. *State v. Graves*, 639.
29. **CHARTER IS SOURCE OF ALL POWER OF MUNICIPAL CORPORATION;** and where the mode in which its power on any given subject can be exercised is prescribed by the charter, the mode must be followed or the corporation will not be bound. *Zottman v. San Francisco*, 96.
30. **CONTRACT MADE BY COMMON COUNCIL OF CITY IN DISREGARD OF CHARTER PROVISIONS** cannot be the ground of any claim against the city. *Id.*
31. **DIRECTIONS GIVEN OR CONTRACTS MADE CONCERNING IMPROVEMENT OF CITY PROPERTY BY INDIVIDUAL MEMBERS OF CITY COUNCIL**, in whom no power in this respect is vested by the city charter, have no greater validity than like directions given and like contracts made by any other

residents of the city assuming to act for the corporation; nor can they by any subsequent approval or conduct impart validity to an otherwise invalid contract on this subject. *Id.*

32. CONTRACT OF MUNICIPAL CORPORATION NOT MADE IN MODE PRESCRIBED BY CHARTER cannot be ratified and made obligatory, in disregard of that mode, by any subsequent action of the corporate authorities. *Id.*
33. RATIFICATION IS EQUIVALENT TO PREVIOUS AUTHORITY, and operates upon the contract in the same manner as though the authority to make the contract had existed originally. *Id.*
34. POWER TO RATIFY NECESSARILY SUPPOSES POWER TO MAKE CONTRACT IN FIRST INSTANCE; and a power to ratify in a given mode supposes the power to contract in the same way. *Id.*
35. WHERE CHARTER OF CITY AUTHORIZES CONTRACT FOR WORK TO BE GIVEN ONLY TO LOWEST BIDDER, after notice of the contemplated work in the public journals, a contract made in any other way—that is, given to any other person than such lowest bidder—cannot be subsequently affirmed; for the corporate authorities cannot do retroactively what they are prohibited from doing originally. *Id.*
36. MUNICIPAL CORPORATION DOES NOT BECOME LIABLE, ON GROUND OF IMPLIED CONTRACT to pay for benefits received, for the value of improvements made without any contract having been made therefor in the manner prescribed by the charter; for the law never implies an agreement against its own restrictions and prohibitions; it never implies an obligation to do that which it forbids the party to agree to do. *Id.*
37. CONTROL OF CONSTRUCTION OF COMMON SEWERS IN CITY OF BOSTON is vested exclusively in the board of alderman, and the city is not liable for any injury or inconvenience occasioned to private persons by the location or construction of such sewers according to the order of that board. *Child v. City of Boston*, 680.
38. CARE AND MAINTENANCE OF COMMON SEWERS, WHEN BUILT, DEVOLVE WHOLLY UPON CITY, and it is bound to provide for keeping them in order through such agents and officers as it may choose to select and appoint; and the city is liable for negligently permitting them to occasion a nuisance to the property of citizens whose private drains connect with them, if such nuisance does not result from their original plan of construction, and might have been avoided by keeping them in proper condition. *Id.*
39. COMMON SEWER, WHEN BUILT, BECOMES PROPERTY OF CITY, and no private person has any power to interfere with it. *Id.*
40. WHERE SEWER IS ORDERED TO BE CONSTRUCTED WITH WASTE WEIR discharging into the empty basin of a certain bay, and it is built according to this order, it becomes the duty of the city, when the flats between the upland and the channel of such basin are filled up and made solid land, to extend such sewer through the land so made, so as to keep open a place of discharge into the basin, the city having the right thus to extend it; and if, through its failure to do this, injury is occasioned to the private property of a person by the overflow of the sewer, the city will be liable in damages. *Id.*
41. INDENTURE GRANTING TO CITY OF BOSTON “RIGHT TO DIG, LAY, AND MAINTAIN all convenient and necessary sewers or drains from the upland to the channel or deep water within the basin, according to law and the common and usual practice for the time being within the city,” must be construed to apply not only to the wants of the city as a private owner

of lands in the neighborhood, but also to the sewers for general use, which it might be its duty, in its municipal capacity, to construct and maintain. *Id.*

See SOVEREIGNTY; WITNESSES.

### CO-TENANCY.

1. TENANT IN COMMON OF TRACT OF LAND IS ENTITLED TO POSSESSION OF, and may maintain ejectment for, the whole tract against all persons except his co-tenants. *Touchard v. Crow*, 108.
2. TENANT IN COMMON CANNOT MAINTAIN TRESPASS where his co-tenant appropriates the proceeds or income of the estate. *Symonds v. Harris*, 553.
3. TENANT IN COMMON MAY MAINTAIN TRESPASS where his co-tenant practically destroys the estate itself or some portion thereof. *Id.*
4. DISSEVERANCE AND REMOVAL BY TENANT IN COMMON OF MACHINERY WHICH CONSTITUTES FIXTURES OF MILL owned in common, and the incorporation thereof into another mill which is the sole property of such tenant in common, without the consent of his co-tenant, is a practical destruction of the common property, and his co-tenant may maintain trespass against him. *Id.*

See HOMESTEADS, 3.

### COUNTERCLAIM.

See PLEADING AND PRACTICE, 43.

### CRIMINAL LAW.

1. ARSON IS MALICIOUS AND WILLFUL BURNING of the house or outhouse of another. *Mary v. State*, 60.
2. BURNING OF HOUSE NECESSARY TO CONSTITUTE ARSON at common law must be an actual burning of the whole or some part of the house. Neither a bare intention nor an attempt to burn a house by actually setting fire to it will amount to arson, if no part of it is burned. But it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance. The Arkansas statute has not changed this rule, except to make the burning of other buildings arson, which at common law were not subjects of that crime. *Id.*
3. BURNING IS MATERIAL ELEMENT OF ARSON under Arkansas statute, and an indictment founded thereon must aver that the property was burned. But to sustain the allegation of burning, it is not necessary to prove that any part of the house, or that the entire building, was consumed. *Id.*
4. PERSON ATTEMPTING TO BURN HOUSE by setting fire to it, but failing to accomplish such burning as constitutes arson under the Arkansas statute, is guilty of a high misdemeanor. *Id.*
5. INDICTMENT FOR ARSON FOUNDED ON ARKANSAS STATUTE, and charging that defendant set fire to the house with intent to injure the owner, is materially defective. It should follow the language of the statute, and charge an intent to burn the house. *Id.*
6. IN ARKANSAS, SLAVE COMMITTING ARSON must be prosecuted as for a felony, though he is not to be punished by imprisonment in the penitentiary. *Id.*
7. WHERE OWNER OF BUILDING BURGLARIZED HAS PREVIOUS NOTICE THAT CRIME IS TO BE COMMITTED, and makes no efforts to prevent the commis-

- tion, but adopts means to secure the arrest of the burglar, the latter's liability to punishment is not thereby changed. *Thompson v. State*, 364.
8. ILLUMINATING GAS MAY BE SUBJECT OF LARCENY. *Commonwealth v. Shaw*, 706.
9. PERSON MAY COMMIT LARCENY OF ILLUMINATING GAS by secretly opening gas company's service-pipe on his premises, and connecting the same with another pipe, through which he secretly and fraudulently receives and uses the company's gas, after it had closed the service-pipe and removed its meter. *Id.*
10. ON TRIAL FOR HOMICIDE, JUDGMENT OF GUILTY WILL NOT BE REVERSED for error in suppressing evidence which would have constituted no legal justification for the homicide, and the exclusion of which, therefore, could have worked no injury or injustice to the plaintiff in error. *Alford v. State*, 209.
11. ERRONEOUS INSTRUCTIONS IN HOMICIDE. — It is erroneous to charge that if two persons arm themselves on account of their quarrel, and both draw, it is quite immaterial which fired first, that there is malice aforethought in each, and that the slayer is guilty of murder; or that if one, in violation of a state law which forbids the secret carrying of deadly weapons, arm himself with a deadly weapon, and in a fight kill his adversary, it will be murder. The law does not necessarily, and under all circumstances, attach malice to the secret carrying of deadly weapons. *Id.*
12. ACTUAL INTENT TO KILL MUST BE FOUND, IN PROSECUTION FOR ASSAULT WITH INTENT TO MURDER, and that under circumstances which would make the killing murder. *Maher v. People*, 781.
13. MALICE AFORETHOUGHT AND ACT OF KILLING ARE ESSENTIAL INGREDIENTS IN OFFENSE OF MURDER, and the presumption of innocence applies equally to them both, hence the burden of proof, as to each, rests equally upon the prosecution. *Id.*
14. LEGAL IMPORT OF TERM "MALICE AFORETHOUGHT" IS FOR COURT TO DEFINE; but the question whether it existed or not, in the particular instance, is one of fact for the jury. *Id.*
15. OFFENSE IS MANSLAUGHTER ONLY, AND NOT MURDER, if the homicide, though intentional, be committed under the influence of passion, or in heat of blood, and is the result of the temporary excitement by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition. *Id.*
16. TO REDUCE OFFENSE FROM MURDER TO GRADE OF MANSLAUGHTER, the reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment. *Id.*
17. WHAT IS REASONABLE OR ADEQUATE PROVOCATION FOR SUCH STATE OF MIND, as should give to a homicide committed under its influence the character of manslaughter, is a question of fact for the determination of the jury. *Id.*
18. QUESTION WHETHER REASONABLE TIME HAD ELAPSED FOR PASSIONS TO COOL, and reason to resume its control, is one of fact for the jury, depending upon all the circumstances of the particular case. *Id.*
19. STATEMENT OF PRISONER IN CRIMINAL CASE IS FOR CONSIDERATION OF JURY, who may give it such credit, in whole or in part, as under all the circumstances they may deem it entitled to. *Id.*

20. STATEMENT OF EVIDENCE PROPOSED AND OFFERED BY DEFENDANT, on trial of indictment for assault with intent to murder, held to have been erroneously rejected in this case. Manning, J., dissenting. *Id.*
21. INDICTMENT IN CALIFORNIA IS MORE THAN MERE ACCUSATION based upon probable cause, being an accusation based upon legal testimony of a direct and positive character, and the concurring judgment of at least twelve of the grand jurors that upon the evidence presented to them the defendant is guilty. *People v. Tinder*, 77.
22. GRAND JURY OUGHT TO FIND INDICTMENT when all the evidence before them taken together is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by a trial jury; otherwise, they should not find an indictment. *Id.*
23. JURY MUST HAVE REASONABLE DOUBT WHETHER ACCUSED PURPOSELY AND MALICIOUSLY COMMITTED CRIME, in a prosecution for murder, if, upon the whole evidence in the cause, they have a reasonable doubt whether he was sane when he committed the act. *Polk v. State*, 382.
24. ACCUSED IS PRESUMED INNOCENT until the prosecution establishes his guilt by proof of every material allegation and every ingredient of the crime. He may stand on this presumption, withholding all proof, until the prosecution has made out a complete case. *Horne v. State*, 499.
25. TO CONVICT ON CIRCUMSTANTIAL EVIDENCE, the circumstances must all concur to show that the prisoner committed the crime, and they must all be inconsistent with any other rational conclusion. A few or a multitude of facts proved, all consistent with the supposition of guilt, are not enough to warrant a verdict of guilty. *Id.*
26. CHARGE THAT ANOTHER AND "DEFENDANT might both be guilty as principals in this murder," is a mixed one of law and fact, and is erroneous; for while it contains the proper instruction that two persons may be guilty as principals in one crime, it presents the fact that this is murder, without informing the jury that they are the exclusive judges of the facts. *Id.*
27. ACCESSARY BEFORE FACT, IN ONE STATE, TO CRIME COMMITTED IN ANOTHER, CANNOT BE PUNISHED THEREFOR in the state where the crime was committed; although the laws of the latter state provide that "every person, being without this state, committing or consummating an offense by an agent or means within the state, is liable to be punished by the laws thereof, in the same manner as if he were present, and had commenced and consummated the offense within the state." *Johns v. State*, 408.
28. DYING DECLARATION SHOULD BE ADMITTED AS SUCH, where the person making it believed that he could not recover, though he lived seventeen days after making it. *Commonwealth v. Cooper*, 762.
29. AFTER EVIDENCE THAT ONE INDICTED FOR CRIME HAD ENDEAVORED TO PROCURE WITNESS TO SWEAR FALSELY to facts tending to prove *alibi*, he cannot be allowed to show that on full investigation the selectmen of the town where he lived had before that time assured him that they were satisfied of his innocence. *Id.*
30. DECLARATIONS OF DEFENDANT IN INDICTMENT TO ONE WHO WAS SEARCHING HIS HOUSE after commission of the crime are not admissible in his own favor. *Id.*
31. DYING DECLARATIONS ADMITTED TO PROVE IDENTITY OF DEFENDANT as the person who committed a crime may be rebutted by evidence showing that deceased had met and talked with person whom he was well



acquainted, and had mistaken them at the time for other persons whom they did not resemble, and that he was in the habit of thus mistaking persons. *Id.*

See BAIL.

### CURTESY.

See HUSBAND AND WIFE, 2.

### CUSTOM.

See BANKS AND BANKING, 4-6.

### DAMAGES.

1. AGREEMENT IS TO BE CONSTRUED AS FIXING AMOUNT OF LIQUIDATED DAMAGES, AND NOT PENALTY, which provides that the contractor is to repair certain houses for the sum of fifteen hundred dollars, and have them completed, ready for occupancy, by December 1st, and that "for each and every day's delay in the completion of said houses after December 1st, said contractor is to forfeit five dollars." *Hall v. Crowley*, 745.
  2. UPON DEFAULT, WRIT OF INQUIRY ISSUES TO ASSESS DAMAGES, which the sheriff may execute by summoning a jury from the regular panel, or from by-standers, and having the damages assessed by them either in the presence of the court or before himself. *Aetna Ins. Co. v. Phelps*, 217.
  3. INSTRUCTION THAT MALICE OR GROSS NEGLECT OF PLAINTIFF'S RIGHTS has not been sufficiently established to allow jury to find exemplary damages is proper, if such is the state of the evidence. *Selden v. Cashman*, 93.
  4. MODE OF ASCERTAINING DAMAGES in an action on the case for injury to plaintiff's well, and for pollution of the water thereof, pointed out. *Ottawa Gas Light Co. v. Graham*, 263.
  5. EXEMPLARY DAMAGES WILL NOT BE AWARDED IN ACTION FOR SEIZURE OF STOCK OF GOODS under execution issued upon a void judgment, where the defendants acted in the seizure under the advice of counsel, and it does not appear that they knew or suspected the invalidity of the judgment, and the seizure was made and proceeded with in the ordinary manner. *Selden v. Cashman*, 93.
  6. DAMAGES FOR SEIZURE OF GOODS OF FIRM UNDER EXECUTION ISSUED ON VOID JUDGMENT do not include loss of profits resulting from diminution of business, after the release of the goods from seizure. *Id.*
  7. IN ASCERTAINING MEASURE OF DAMAGES IN ACTION ON CASE for injury to property, all the circumstances connected with the injury are proper to be considered by the jury. *Ottawa Gas Light etc. Co. v. Graham*, 263.
- See DOWER, 6; FALSE IMPRISONMENT; NUISANCE, 4; TRESPASS, 2; VENDOR AND VENDEE, 5, 6.

### DEEDS.

1. DEED MUST CONTAIN OPERATIVE WORDS OF CONVEYANCE. *Sharp v. Bailey*, 489.
2. OPERATIVE WORDS OF RELEASE IN SIMPLE QUITCLAIM DEED are "remit, release, and quitclaim"; and where the words "bargain, sell, and quitclaim" are employed, they operate, not merely to release, but to transfer any interest which the grantor possessed at the execution of the deed. *Touchar d v. Crow*, 108.

3. **LEASE OR DEED NOT TO TAKE EFFECT UNTIL FUTURE DAY** is not for that reason void, according to the well-settled law of Maine. *Jordan v. Stevens*, 556.
  4. **PROMISE BY WOMAN TO MARRY GRANTOR IS GOOD CONSIDERATION FOR DEED**, and she will be entitled to hold the land against his creditors, although the marriage is prevented by his death. *Smith v. Allen*, 758.
- See **ACKNOWLEDGMENTS**; **ATTACHMENTS**, 8; **EQUITY**, 2-4; **EXEMPTIONS**, 4; **HIGHWAYS**, 6; **HOMESTEADS**, 9-14; **MARRIED WOMEN**; **REGISTRATION**; **TAXATION**; **TRUSTS**; **VENDOR AND VENDEE**.

#### DEPOSITIONS.

See **EVIDENCE**, 11, 12.

#### DIVORCE.

See **MARRIAGE AND DIVORCE**.

#### DOMICILE.

1. **PLACE OF CHILD'S BIRTH IS IN LAW ITS DOMICILE**, if it was, at the time of the birth, the domicile of its parents. *Taylor v. Jeter*, 202.
2. **DOMICILE OF BIRTH OF MINOR CONTINUES** until the child has obtained a new domicile. *Id.*
3. **MINOR IS INCAPABLE OF CHANGING HIS DOMICILE DURING MINORITY**, and must therefore retain the domicile of his parents. *Id.*
4. **MINOR'S DOMICILE CANNOT BE CHANGED BY ACT OF STRANGER** in wrongfully removing his person; as when such removal takes place without the consent of the minor's father, who still lives. *Id.*

#### DOWER.

1. **TO COMPEL WIFE TO ELECT**, provisions of will must be such as to show an evident intention on the part of the testator to exclude the claim of dower; the provisions of the will, or some of them, must be absolutely inconsistent with her claim of dower. *Worthen v. Pearson*, 213.
2. **WIFE IS NECESSARILY PUT TO HER ELECTION**, where the whole property is conveyed by the testator, if it is clear that there is one part of the property which the testator did not intend should be subject to the claim of dower; for it would follow, in such a case, that he did not intend that any portion of it should be subject to such a claim. *Id.*
3. **WIFE IS PUT UPON HER ELECTION** by the charge of an annuity upon land in favor of the widow, or "a support and home" for her, where it is made a charge upon land devised by the husband. *Id.*
4. **WHERE WIFE HAS ELECTED TO TAKE DOWER** out of her husband's estate, where he has devised it all, she cannot have "a home and support" also charged upon the same estate. *Id.*
5. **INCHOATE RIGHT OF DOWER ONCE VESTED IN WIFE** cannot be divested except by her own voluntary act performed in the mode prescribed by law. *Nicoll v. Ogden*, 311.
6. **DAMAGES FOR NON-ASSIGNMENT OF DOWER** pursuant to demand are recoverable, notwithstanding the refusal to assign was made in the utmost good faith under belief that the claimant was not entitled thereto. *Id.*
7. **MONEY BORROWED OF THIRD PERSON AND INVESTED IN PURCHASE OF LAND** is not purchase-money within meaning of Illinois dower law. *Jensen v. Garden*, 306.

See **HOMESTEADS**, 12; **HUSBAND AND WIFE**; **POWERS**, 3.

DURESS.

**MARRIED WOMAN'S RIGHT TO AVOID MORTGAGE BECAUSE OF DURESS IS NOT IMPAIRED**, nor is the mortgagee's right to set it up as valid strengthened because the mortgagee personally took no part in procuring its execution, but its execution was obtained by the husband, to secure his debt to the mortgagee. *Central Bank v. Copeland*, 597.

See **ACKNOWLEDGMENTS**, 3; **CONTRACTS**, 10, 11; **HUSBAND AND WIFE**, 2; **MARRIED WOMEN**, 4; **NEGOTIABLE INSTRUMENTS**, 11.

DYING DECLARATIONS.

See **CRIMINAL LAW**, 28-31.

EASEMENTS.

**RIGHT OF ONE TO OVERFLOW LAND OF ANOTHER IS EASEMENT**, and an interest in real estate, and title thereto must be conveyed by grant, and established by proof of an actual grant, or of prescription from which a grant will be inferred. *Snowden v. Wilas*, 370.

See **LICENSE**, 4.

EJECTMENT.

See **CO-TENANCY**, 1; **GUARDIAN AND WARD**, 9.

ELECTION.

See **DOWER**, 1-4.

ELECTIONS.

1. **OFFICE OF JUDGE OF ELECTION IS JUDICIAL IN ITS NATURE**, and such officer cannot be held legally responsible for anything more than an honest and faithful exercise of his judgment, and is not liable for the consequences of mistakes honestly made. *Bevard v. Hoffman*, 618.
2. **JUDGE OF ELECTION IS NOT LIABLE FOR REFUSING TO ALLOW PERSON TO VOTE**, under an error of judgment, but is only liable when he acts willfully, fraudulently, or corruptly. *Id.*
3. **ELECTION IS NOT VOID BY REASON OF OMISSION TO GIVE NOTICE THAT IT WAS TO TAKE PLACE**. *State v. Jones*, 403.

EMINENT DOMAIN.

1. **ACT OF OPENING, WIDENING, AND CLOSING STREETS IS EXERCISE OF RIGHT OF EMINENT DOMAIN**, delegated by the legislature of a state to a city, as to other corporations, to be used for purposes of public good. To subordinate it to any private end would be a perversion of the highest prerogative known to constitutional government. *State v. Graves*, 639.
2. **POWER OF EMINENT DOMAIN, HOWEVER EXERCISED, IS SUBJECT TO CONSTITUTIONAL INHIBITION** that the legislature shall enact no law authorizing private property to be taken for public use without just compensation being first paid or tendered. *Id.*
3. **ASSESSMENT OF BENEFIT DUES ON PROPRIETORS BENEFITED BY STREET IMPROVEMENT IS CONSTITUTIONAL MODE** of providing compensation to owners of land taken for public use; as is also the assessment by commissioners in the city of Baltimore, with the right of appeal to the criminal court. *Id.*

4. COMMISSIONERS FOR OPENING AND WIDENING STREETS OF BALTIMORE HAVING SPECIAL PUBLIC DUTY AND JURISDICTION ASSIGNED THEM, to be executed in a prescribed form, their proceedings are of a legal character, and must be regarded as subject to all the incidents of proceedings, in the nature of a writ of inquisition *ad quod damnum*, being but means to the same end. *Id.*
5. CONDEMNATION OF PRIVATE PROPERTY TO PUBLIC USE IS NOT COMPLETE until the proprietor is paid or tendered the value of his property, as ascertained by the inquest or assessment. No preliminary step prior to actual payment or tender so fixes the condemning corporation as to prevent an abandonment of the condemnation or enterprise. *Id.*
6. PERSONS DEALING WITH COMMISSIONERS FOR OPENING AND WIDENING STREETS, FOR PROPERTY OR MATERIALS PARTIALLY APPROPRIATED TO PUBLIC USE, deal with them as public officers, acting under the municipal councils, which have the power and the right to abandon any projected improvement, when it becomes obvious that it will not promote the public good. *Id.*
7. PROCEEDINGS OF COMMISSIONERS FOR OPENING AND WIDENING STREETS, under the ordinance of 1850 of the city of Baltimore, are a substitute for the inquisition of a jury, to ascertain the actual cost of any projected improvement, and have no further effect. *Id.*
8. MUNICIPAL CORPORATION WILL NOT BE COERCED TO ADOPT CONDEMNATION OF PRIVATE PROPERTY for street improvements, at the instance of purchasers buying an imperfect title thereunder, with full knowledge of the facts, if the corporation will not be coerced to adopt the condemnation, at the instance of the proprietors, who are unwilling vendors. *Id.*

See CORPORATIONS, 6.

### EQUITY.

1. EQUITABLE RELIEF MAY BE GRANTED TO DEFENDANT IN LEGAL ACTION, in those states where law and equity are administered in the same court, if the pleadings present the necessary averments. *Snowden v. Wilas*, 370.
2. EQUITY HAS JURISDICTION TO COMPEL DELIVERY AND SURRENDER OF DEED of mortgage, which, after having been executed and delivered, though not acknowledged, has been intrusted to the mortgagor for the purpose of having it recorded, if he thereupon retains it in his own possession and refuses to deliver it up or have it recorded. *Pierce v. Lamson*, 732.
3. CONTRACT ENTERED INTO UNDER MUTUAL BELIEF OF PARTIES THAT LAW OF SUBJECT-MATTER was established by a decision of the supreme court, will not be set aside in equity because of a subsequent decision of the same court overruling the former one, and declaring a different rule upon the subject. *Kenyon v. Welty*, 137.
4. TO SUSTAIN BILL IN EQUITY TO REFORM DEED ON GROUND OF MISTAKE, the proof that it does not conform to the oral contract, as understood by the parties, must be entirely exact and satisfactory. *Sawyer v. Hovey*, 659.
5. ANSWER IN CHANCERY IS TAKEN AS TRUE, IF NO REPLICATION IS FILED. *Trout v. Emmons*, 326.
6. SWORN ANSWER IN CHANCERY MUST BE OVERCOME BY TESTIMONY OF TWO WITNESSES, or its equivalent. *Id.*

7. **DECREE PRO CONFESSO IS ERRONEOUS**, when passed on order of publication, directing publication for three weeks instead of one month, as required by statute. *Central Bank v. Copeland*, 597.

See **CONTRACTS**, 10, 11; **EVIDENCE**, 4, 5; **INJUNCTIONS**; **MISTAKE**; **MORTGAGES**, 1; **STATUTE OF LIMITATIONS**, 1, 2; **WILLS**, 4, 5.

### ESTATES OF DECEDENTS.

1. **PROVISION OF CALIFORNIA ACT REGULATING SETTLEMENT OF ESTATES OF DECEDENTS**, declaring that no sale of any property of an estate shall be valid unless made upon an order of the probate court, is applicable to sales by executors and administrators only, and does not refer to judicial sales under decrees of court, nor to sales in pursuance of testamentary authority. *Fallon v. Butler*, 140.
2. **ALLEGATION OF PRESENTMENT OF CLAIM IS UNNECESSARY**, in an action to enforce specific liens and equitable rights against an estate. *Id.*
3. **TERM "CLAIMS," AS USED IN CALIFORNIA ACT REGULATING SETTLEMENT OF ESTATES OF DECEDENTS**, refers only to such debts or demands against the decedent as might by action be reduced to simple money judgments, and does not embrace mortgage liens. *Id.*
4. **JURISDICTION OF PROBATE COURT OVER SETTLEMENT OF ESTATES OF DECEDENTS** attaches and becomes effective only upon the granting of letters of administration; and the power to make an order directing the sale of real estate for the payment of debts arises only upon the presentation by the legal and regular administrator of the petition prescribed by law. *Long v. Burnett*, 420.
5. **PRESENTATION OF PETITION FOR ORDER TO SELL DECEDENT'S REALTY** for payment of debts by administrator confers upon the court jurisdiction of the subject-matter, and its subsequent proceedings will be presumed to be as regular and conclusive as those of courts of general jurisdiction. And the action of the court will not be collaterally reviewed when the jurisdiction so far attaches as to require the court to hear and determine the sufficiency of the facts relied upon to confer such jurisdiction, whether they relate to the law, the process, the notice, or the petition. *Id.*

See **ADVANCEMENTS**; **EXECUTORS AND ADMINISTRATORS**; **MORTGAGES**, 10; **STATUTE OF LIMITATIONS**, 5; **WILLS**.

### ESTOPPEL.

1. **TO MAKE RECORD OF FORMER TRIAL EVIDENCE TO CONCLUDE ANY MATTER IN ISSUE BETWEEN PARTIES**, it should appear by the record, or other proof, that the same matter was in issue and decided at the former trial, between the same parties. *Cecil v. Cecil*, 626.
2. **ESTOPPELS MUST BE RECIPROCAL AND BIND BOTH PARTIES**. They operate only on parties and privies in blood or estate, and can be used neither by nor against strangers. *Id.*
3. **ALL PERSONS ARE EQUALLY CONCLUDED BY SAME JUDICIAL PROCEEDINGS**, who are represented by the parties, and claim under them or in privity with them. *Id.*
4. **ESTOPPEL ARISES UPON MATTER OF FACT**, and not upon matter of law. *Snyder v. Studebaker*, 415.

See **CORPORATIONS**, 1, 2; **HUSBAND AND WIFE**; **JUDGMENTS**, 6.

## EVIDENCE.

1. EVIDENCE IS INADMISSIBLE TO PROVE fact not alleged in the bill. *Beeswell v. Goodwin*, 169.
  2. RULE THAT OBJECTIONS TO EVIDENCE MUST BE SPECIFIC APPLIES ONLY TO SUCH OBJECTIONS as can be obviated by other evidence, or by the act of the party or the court. *Clauser v. Stone*, 299.
  3. WHERE TESTIMONY FOR DEFENDANT, IMPROPERLY REJECTED BY COURT, IS OFFERED BY STATE, AND OBJECTED TO by defendant, the error is cured, and the defendant cannot complain that he was hurt by the previous decision; the maxim of the law being, *Volenti non fit injuria*. *Alford v. State*, 209.
  4. WRITTEN CONTRACT, AS EVIDENCED BY BONDS AND MORTGAGE, CANNOT BE VARIED, in the absence of fraud, accident, or mistake, in a suit to foreclose the mortgage, by evidence of a parol agreement to the effect that at the time when a deed of the land was made, and the bonds and mortgage were executed to secure payment of the purchase-money, the grantor promised to pay off an existing mortgage on the land, and if he should fail to do so, the grantee might retain a sufficient sum for that purpose out of the last installments of the price; especially when such evidence is introduced to raise an equity against an assignee of the mortgage in good faith, without notice or knowledge of the agreement. *Times v. Shannon*, 632.
  5. PAROL EVIDENCE TO VARY OR CONTRADICT WRITTEN CONTRACT IS INADMISSIBLE IN EQUITY, as well as at law, in the absence of fraud, accident, or mistake. *Id.*
  6. PARTY CANNOT BE PERMITTED TO READ IN EVIDENCE UNANSWERED LETTER from himself to the adverse party, for the purpose of proving the truth of facts stated in it, although it was in reply to a letter to himself, which has been put in evidence. *Fearing v. Kimball*, 690.
  7. WITNESS CANNOT TESTIFY TO CONTENTS OF WRITING VOLUNTARILY AND DELIBERATELY DESTROYED by himself in a suit brought by himself and founded upon the writing unless he first introduces evidence to rebut the suspicion of fraud arising from his act. "*Count Joannes*" v. *Bennett*, 738.
  8. EXTRINSIC EVIDENCE IS NOT ADMISSIBLE to change the meaning of a word having a general well-defined signification, but if a word is employed which has no definite and specific general meaning, its local meaning may be proved. *Galena Ins. Co. v. Kupfer*, 284.
  9. MERE READING OF CROSS-INTERROGATORIES and answers in evidence at the trial is not proof, as matter of law, in a subsequent action between the same parties, that they were relevant. *Lawson v. Hicks*, 49.
  10. ENTRIES MADE BY THIRD PARTIES IN BANK-BOOKS are hearsay merely, and are not proper evidence in an action upon a promissory note. *Barnes v. Simmons*, 248.
  11. COURT COMMITS ERROR BY ALLOWING TESTIMONY TAKEN DOWN UNDER STATUTE TO BE DISCREDITED by evidence showing that the penman performed his duty in an inexperienced and bungling manner. *Alford v. State*, 209.
  12. EX PARTE VOLUNTARY DEPOSITIONS, MADE FOR COLLATERAL PURPOSE, CANNOT BE READ AS EVIDENCE in a case, though the witness be dead, or absent in the public service. *Id.*
- See ACKNOWLEDGMENTS; ATTORNEYS, 3-5; CORPORATIONS, 16; CRIMINAL LAW; EQUITY; JURISDICTION; JURY AND JURORS; LEGITIMACY; LABEL,

**7; PLEADING AND PRACTICE; POWERS, 2, 3; SHERIFFS, 2; STATUTES, 3; STATUTE OF LIMITATIONS, 7; TAXATION; VENDOR AND VENDEE, 4; WAGERS, 2; WILLS; WITNESSES.**

### EXECUTIONS.

- 1. INFORMAL AND DEFECTIVE RETURN OF LEVY ON REAL ESTATE, IF CURED BY AMENDMENTS** duly and properly allowed by the court, is binding upon the parties to the levy. *Symonds v. Harris*, 553.
  - 2. LEVY ON REAL ESTATE IS NOT DEFECTIVE BECAUSE APPRAISEMENT OF UNDIVIDED PORTION** set off to creditor is not made at the same rate at which the whole estate is appraised, if the statute does not, in such cases, require appraisement of the whole estate, for the latter being unnecessary must be treated as surplusage. *Id.*
  - 3. SALE OF REAL OR PERSONAL PROPERTY ON EXECUTION WILL NOT BE VACATED** by a reversal of the judgment, and the writ of restitution after reversal issues only for the amount for which the property sold on execution. *Stinson v. Ross*, 591.
  - 4. SHERIFF'S DEED NEED NOT SHOW THAT STATUTE REQUIREMENTS IN REGARD TO NOTICE** were complied with. It is sufficient if the officer's return of the sale on the execution shows that the proper notices were given. *Id.*
  - 5. PURCHASER OF LANDS SOLD ON EXECUTION ACQUIRES ONLY LIEN UPON LANDS** for the amount of his bid, and interest during the redemption period. *Curtis v. Millard & Co.*, 460.
  - 6. LEGAL ESTATE OF JUDGMENT DEBTOR IS NOT DIVESTED BY SALE** of his land under execution until after the expiration of the time for redemption, and the title has vested in the purchaser by deed from the sheriff, and prior to that time such estate may be the subject of a lien, or of a sale under execution, or of a conveyance by deed from the debtor. *Id.*
  - 7. REGULARITY OF PROCESS CANNOT BE QUESTIONED COLLATERALLY BY STRANGER TO SALE UNDER EXECUTION.** *Durham v. Heaton*, 275.
  - 8. PURCHASER AT EXECUTION SALE, OTHER THAN PLAINTIFF IN WRIT,** will not be defeated in his title by any defect or irregularity in the execution. *Id.*
  - 9. DEFECTIVE AND VOIDABLE EXECUTION CAN BE AMENDED BY JUDGMENT** as well after as before the sale, and parol proof by the keeper of the records is admissible to show the identity of the execution. *Id.*
  - 10. JUDGMENT RENDERED AGAINST DEBTOR AFTER EXECUTION SALE OF HIS LAND,** and before the expiration of the redemption period, attaches as a lien upon debtor's interest therein, and a grantee of the debtor takes the premises subject to the same liens and encumbrances that existed upon them in the hands of the debtor. *Curtis v. Millard & Co.*, 460.
  - 11. FAILURE OF SUBSEQUENT JUDGMENT CREDITOR TO REDEEM LAND OF DEBTOR** from sale under former judgment does not render his judgment lien inoperative against the debtor or his grantee, in the event either should redeem within the time allowed by law. *Id.*
- See BONDS, 2; CORPORATIONS, 22; DAMAGES, 5, 6; EXEMPTIONS; SHERIFFS.**

### EXECUTORS AND ADMINISTRATORS.

- 1. POWERS OF SPECIAL ADMINISTRATOR** under Iowa revised laws of 1843 are limited to the preservation of personal property of the decedent until a regular administrator can be appointed, and an order of the probate court



directing the sale of real estate by a special administrator would, under such statute, be without authority of law and void, and the regularity of such an order, and the proceedings thereunder, may be collaterally impeached. *Long v. Burnett*, 420.

2. **HOW COURT IS INVESTED WITH JURISDICTION TO ORDER ADMINISTRATOR'S SALE.** — The administrator may bring all adverse parties into court in either of two ways: 1. By serving a written or printed notice, together with a copy of the account and petition, on all the heirs or devisees in whom the title of the land proposed to be sold may be vested; 2. By publishing a notice to all parties interested to come in and show cause why the land should not be sold according to the prayer of the petition. Either mode is equally efficacious to give the court complete jurisdiction. *Gibson v. Roll*, 219.
3. **PROCEEDINGS BY ADMINISTRATOR TO SELL REAL ESTATE BIND INFANTS**, though they are not nominally made parties to the proceedings. *Id.*
4. **STATUTE SHOULD BE COMPLIED WITH IN ADMINISTRATOR'S SALE.** *Id.*
5. **SUFFICIENCY OF NOTICE OF ADMINISTRATOR'S SALE OF DECEDENT'S ESTATE** is determined by the court. *Id.*
6. **NOTICE OF ADMINISTRATOR'S SALE OF DECEDENT'S ESTATE NEED NOT CONTAIN** the names of infant claimants, though the proceeding is adverse to them. It is sufficient if the statute is followed. *Id.*

See **ADVANCEMENTS; ESTATES OF DECEDENTS; JUDGMENTS**, 2.

#### EXEMPTIONS.

**STATUTE EXEMPTING DEBTOR'S TOOLS AND INSTRUMENTS TO VALUE OF ONE HUNDRED DOLLARS EMBRACES MACHINES** of simple construction, moved by hand or foot, and used in the manufacture of boots; and this, although the machines are generally used by men whom the owner employs in his business. *Daniels v. Haywood*, 731.

See **HOMESTEADS**.

#### FALSE IMPRISONMENT.

1. **CONVICTION AND SENTENCE OF PERSON TO PENITENTIARY BY COURT HAVING NO JURISDICTION** are nullities, and afford no protection to those who keep him in confinement; and those holding him in confinement are presumed to know the law, and that they have no legal right to keep him imprisoned. *Patterson v. Prior*, 367.
2. **WHERE PERSON WHO ILLEGALLY IMPRISONS ANOTHER RECEIVES SOME BENEFIT** by reason of the latter's imprisonment, the person so imprisoned may waive the tort and sue upon the implied *assumpsit*; but if the person who illegally confined him received no benefit by reason of such confinement, there is no consideration to support an implied *assumpsit*. *Id.*

#### FIXTURES.

**MACHINERY OF SASH-AND-BLIND FACTORY, WITHOUT WHICH IT CANNOT BE OPERATED**, and attached to the mill by spikes, nails, bolts, and screws, and operated by belts running from permanent horizontal shafting driven by a water-wheel under the mill, constitutes fixtures of the mill. *Symonds v. Harris*, 553.

See **CO-TENANCY**, 4.

**FORGERY.**

See BONDS, 1.

**FRAUD.**

1. **FRAUD, WHAT CONSTITUTES.**—Neither a knowledge of the falsity of a representation, nor the presence of circumstances manifesting a recklessness of truth, is an indispensable ingredient of fraud. Any representation by the vendor of land in regard to a material fact, which operated as an inducement to the purchase, upon which the vendee had a right to rely, and by which he was actually deceived and injured, is fraud. *Foster v. Kennedy*, 56.
2. **FRAUD MUST BE SPECIALLY PLEADED UNDER CODE**, although at common law it could be given in evidence under the general issue. *Jenkins v. Long*, 374.
3. **REPRESENTATION, TO BE FRAUDULENT**, must be of a fact, and not an expression of opinion, must be false to a material extent, must be made under such circumstances that a party has a right to rely on it, and must be relied on. *Id.*

See VENDOR AND VENDEE, 3-6.

**GAS.**

See CRIMINAL LAW, 8, 9.

**GRANT.**

See EASEMENTS; PUBLIC LANDS.

**GROWING CROPS.**

- IT IS NOT CONSTRUCTIVE DELIVERY OF HAY AS CHATTEL, SO AS TO PASS TITLE** to it, as against third persons, under a sale of grass with an agreement that the vendor shall cut it at the proper time, to pluck a handful of the half-grown grass, and deliver it to the purchaser in the field. *Lamson v. Patch*, 765.

**GUARDIAN AND WARD.**

1. **COURTS EVERYWHERE, ON HABEAS CORPUS PROCEEDINGS, TO OBTAIN CUSTODY OF INFANT**, will TAKE CARE not to commit such child to improper or unsafe custody; and will look with an eye single to the interests of the minor. Courts will recognize the father as the child's natural guardian, unless he is shown to be an unfit and unsafe custodian; and where a state court of competent jurisdiction determines that the father is a fit and proper custodian of his minor child, the courts of a sister state will not disturb his authority, except upon the most overwhelming evidence of his unfitness to occupy this relation. Especially are these doctrines applicable where the child has been removed by a stranger from the domicile of his father to a foreign state without the consent of the latter. *Taylor v. Jeter*, 202.
2. **FATHER IS NATURAL GUARDIAN OF HIS MINOR CHILD BORN IN WEDLOCK**, and as such is entitled to its custody and management. *Id.*
3. **GRANT TO FATHER OF LETTERS OF GUARDIANSHIP OVER PERSON AND PROPERTY OF HIS MINOR CHILD**, born in wedlock, and made by a court of competent jurisdiction, where the child and father were domiciled, strengthens the claim of the latter when contested beyond that jurisdiction. *Id.*

11. **MORTGAGE OF HOMESTEAD PROPERTY BY HUSBAND WITHOUT CONCURRENCE OF WIFE** is invalid, notwithstanding his wife subsequently dies, and will not, if he marry again, preclude his second wife's right of homestead in such property; nor will she be concluded by a foreclosure decree by default, entered after such second marriage, in an action to which the second wife was not a party, though the decree will be conclusive as to the husband. *Id.*
12. **DEED SIGNED BY HUSBAND AND WIFE WILL NOT CONVEY HOMESTEAD**, where wife does not join in granting part, but only in the *in testimonium* part, where she joins to release dower. In legal effect it amounts to no more than a deed by the husband, and a relinquishment of dower by the wife in a separate instrument. *Sharp v. Bailey*, 489.
13. **NO OPERATIVE CONVEYANCE OR EFFECTUAL RELEASE OF HOMESTEAD EXEMPTION** can be made unless the mode pointed out by the statute is pursued with reasonable strictness. *Id.*
14. **HOMESTEAD LAW OF ILLINOIS MAKES RELEASE OF HOMESTEAD RIGHT BY WIFE NECESSARY** to the validity of all conveyances of the homestead, and a deed of trust or mortgage of the premises, and a sale thereunder, is invalid without such release. *Best v. Allen*, 338.
15. **DELAY BY CREDITOR IN ENFORCING DEBT CONTRACTED BEFORE PASSAGE OF HOMESTEAD LAW**, which debts, the law provides, may be satisfied out of the homestead after exhausting the other property of the debtor subject to execution, does not prevent the creditor from seizing the homestead, if at the time of his levy the judgment debtor had no other leviable property, notwithstanding after the maturity of the claim or during the pendency of the judgment lien the debtor had abundance of other property, which in the mean time is disposed of either voluntarily or by judicial sale. *Denegre v. Haun*, 480.
16. **STATUTORY PROVISION THAT OTHER PROPERTY OF DEBTOR SHALL BE EXHAUSTED** in satisfaction of debts antecedent to homestead law, before resort is had to the homestead, is directory merely, and a failure to observe it does not affect the title of a purchaser of the homestead at the judicial sale. *Per Lowe, J. Id.*

See MORTGAGES, 18.

### HOMICIDE.

See BAIL; CRIMINAL LAW, 10-20, 26.

### HUSBAND AND WIFE.

1. **WIDOW'S RIGHT TO DISTRIBUTIVE SHARE OF HUSBAND'S PERSONAL ESTATE** IS NOT BARRED by an antenuptial agreement that she would accept certain provisions therein undertaken to be made for her by him, in place of and as a substitute for dower in his estate, and as a bar and estoppel to any and every other claim by her upon his estate. *Sullings v. Richmond*, 742.
2. **MORTGAGE EXECUTED BY HUSBAND AND WIFE, OF WIFE'S LANDS, OPERATES ON HUSBAND'S INTEREST** as tenant by the curtesy, although it is invalid as to the wife, on the ground of duress. *Central Bank v. Copeland*, 597.

See DOWER; DURESS; NEGOTIABLE INSTRUMENTS, 14.

### INDIANS.

See INTERNATIONAL LAW; MARRIAGE AND DIVORCE, 2.

INDICTMENTS.

See BAIL; CRIMINAL LAW.

INFANCY.

See DOMICILE; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD.

INJUNCTIONS.

1. INJUNCTION TO PROTECT PROPERTY DURING LITIGATION WILL NOT BE ALLOWED, where the complaint shows that the party seeking the injunction has no title to or interest in the property, and no claim to the ultimate relief sought by the litigation. *State v. McGlynn*, 118.
2. INJUNCTION WILL NOT BE GRANTED AT SUIT OF STATE to prevent dissipation of the property of an estate pending litigation under an information filed by the state, seeking a decree that the estate had escheated to the state, where the complaint for the injunction shows that a will of the deceased has been admitted to probate, by which the estate is devised, though it is alleged that the will is a forgery; for the state is not entitled to the ultimate relief sought by the litigation, since the decree of the probate court establishing the will is final and conclusive. *Id.*
3. REMEDY FOR WRONGFULLY CAUSING INJUNCTION TO BE ISSUED is by suit upon the injunction bond. Action on the case cannot be maintained. *Gorton v. Brown*, 245.

INSANITY.

See NEGOTIABLE INSTRUMENTS, 11.

INSOLVENCY.

ASSIGNMENT IN INSOLVENCY DOES NOT VEST IN ASSIGNEES property which has been put into the debtor's hands for the fraudulent purpose of giving him a false credit, although some of his creditors may have been defrauded thereby. *Audenried v. Betteley*, 755.

See ATTORNEYS, 5.

INSTRUCTIONS.

See CRIMINAL LAW; PLEADING AND PRACTICE.

INSURANCE.

1. CONDITION OF POLICY OF MUTUAL INSURANCE COMPANY THAT NO INSURANCE SHALL TAKE EFFECT until the cash premium has been actually paid at the office of the company, and that every insurance agent, or other persons forwarding applications or receiving premiums, is the agent of the applicant and not of the company, is not complied with by a payment of the premium to an insurance agent through whom the application is received and the policy delivered. Such condition is a condition precedent to the taking effect of the policy. *Mulrey v. Shawmut Mut. Fire Ins. Co.*, 689.
2. OFFICERS OF MUTUAL INSURANCE COMPANY HAVE NO AUTHORITY TO WAIVE the by-laws and provisions adopted by the members of the company for their mutual protection. *Id.*
3. ACTION OF COVENANT WILL LIE ON SEALED POLICY OF INSURANCE, renewed by a parol receipt, where the policy provides for the continuance of itself by its own terms, on the payment of the premium and taking a receipt therefor. *Herron v. Peoria Marine etc. Ins. Co.*, 272.

4. **DECLARATION IN ACTION ON INSURANCE POLICY NEED NOT NEGATIVE** the performance of a condition that in case of loss the company might restore the building. *Aetna Ins. Co. v. Phelps*, 217.
5. **ORIGINAL APPLICATION FOR INSURANCE NEED NOT BE SET OUT IN PLEADING**, in action on policy. The insured is not bound to prove the truth of his representations; but they are subject to attack by the defendant, and if he shows their falsity in a material part, the former cannot recover. *Heron v. Peoria Marine Ins. Co.*, 272.
6. **NOTICE OF LOSS NEED NOT BE GIVEN TO SECRETARY OF INSURANCE COMPANY** in person, and is sufficient if given and received at the company's office or place of business. *Id.*
7. **AVERMENT IN ACTION ON INSURANCE POLICY THAT NOTARY WHOSE CERTIFICATE FORMED PART OF PRELIMINARY PROOF OF LOSS** was the nearest notary to the place of the fire, is unnecessary, where the certificate was received by the company without objection. *Id.*
8. **INSURANCE COMPANY INTENDING TO EXCEPT TO FORMAL DEFECT IN PROOF OF LOSS** should do so in time for the insured to remedy it, otherwise it will be regarded as waived by the company. *Id.*
9. **WHERE POLICY REQUIRES INSURED TO DELIVER ACCOUNT** of their loss, under oath, declaring the account to be true and just, together with other facts, the affidavit of the insured is admissible to prove a compliance with such condition, but for no other purpose. *Phoenix Ins. Co. v. Lawrence*, 521.
10. **WHERE POLICY OF INSURANCE IS VOID** because the insured kept prohibited articles in the house, a promise on the part of the insurers' agent to pay a loss will not bind them, when the agent having authority to adjust and pay losses has knowledge that the prohibited articles were kept in the house at the time of the fire. *Id.*
11. **KEEPING OF ARTICLES DENOMINATED AS HAZARDOUS**, in policy of insurance, after the issuing of such policy, if prohibited by it, does not render the policy void, but only suspends it, while the prohibited articles are kept in the premises. *Id.*
12. **CONDITIONS OF KEEPING AND ENUMERATION** of articles mentioned as hazardous in policy of insurance forms part of it, and if prohibited by it, it is not necessary for the insurer to show that the keeping thereof caused the loss or increased the risk. *Phoenix Ins. Co. v. Lawrence*, 521.
13. **KEEPING OF ARTICLES MENTIONED AS HAZARDOUS** in policy of insurance by the insured when they obtained the policy does not render it void unless they concealed that fact from the insurer. *Id.*
14. **JURY HAS NO RIGHT TO DECLARE POLICY OF INSURANCE VOID** for the reason that the insured kept articles mentioned in such policy as hazardous and prohibited, when the insurer's pleadings fail to allege that any such articles were kept in the insured premises when the policy was issued, or that the insured made any concealment with reference thereto. Such is the rule, even though the above facts are proved. *Id.*
15. **WHERE POLICY OF INSURANCE PROHIBITS** the keeping of certain articles specified therein as hazardous, in an action on the policy the insurer is not presumed to know what prohibited articles were kept by the insured, and is not bound to specify them in his pleadings; but if he specifies some without alleging that any others were kept by the insured, the jury should not be permitted to consider any except those specified. *Id.*
16. **WHERE HOUSE AND GOODS ARE INSURED** for separate sums, though the insurance on the house may be void, an incorrect description of the in-

terest of the insured will not vitiate the insurance on the goods, in the absence of proof that the house was insured for a fraudulent purpose, or that the incorrect description of the interest of the insured in the house induced the insurer to insure the goods. *Id.*

17. **CONSTRUCTIVE POSSESSION OF INSURED GOODS** by sheriff, under an execution, is not such change of possession as avoids the policy of insurance. *Id.*
18. **DEED TERMINATING ACTUAL INTEREST** of the insured in goods, and transferring the actual possession to the purchaser, avoids the policy of insurance. *Id.*
19. **UNDER POLICY OF INSURANCE CONTAINING CLAUSE** prohibiting "any transfer of the interest of the assured by sale or otherwise," without the consent of the insurer, a deed assigning the constructive possession of the insured goods to certain parties in trust for the benefit of creditors does not terminate the interest of the insured nor avoid the policy. *Id.*
20. **ANY MATERIAL CHANGE IN TITLE**, though not by alienation, will avoid insurance which provides that any alteration or change in the title shall avoid it. *Barnes v. Union Mutual Fire Ins. Co.*, 562.
21. **POLICY OF INSURANCE ON UNDIVIDED HALF OF BUILDINGS**, providing that it shall be void "when the title of any property insured shall be changed by sale, mortgage, or otherwise," becomes void upon partition of the premises made on a judgment therefor rendered on the petition of the co-tenant of the insured. *Id.*
22. **POLICY OF INSURANCE ON BUILDINGS AND FURNITURE THEREIN IS INDIVISIBLE**, and if made void by the assured as to any of the items of property insured, the whole policy is void; therefore where the policy is avoided by a change of title to the buildings, recovery cannot be had for the loss of the furniture. *Id.*
23. **CONDITION IN INSURANCE POLICY THAT COMPANY MAY RESTORE BUILDING DESTROYED** is a condition subsequent, which, if performed, may be set up by the company in defense. *Aetna Ins. Co. v. Phelps*, 217.

## INTEREST.

See USURY.

## INTERNATIONAL LAW.

1. **TRIBE OF NORTH AMERICAN INDIANS DOES NOT CONSTITUTE NATION**, so that its laws will be recognized in a state, by international comity. *Roche v. Washington*, 376.
2. **STATE IS NOT BOUND BY INTERNATIONAL COMITY TO GIVE EFFECT TO LAWS OF ANOTHER STATE**, which are repugnant to the laws and policy of the former. *Id.*

## INTERVENTION.

See ATTACHMENT, 2, 3.

## JUDGMENTS.

1. **JUDGMENT BY CONFESSION IS AFFIRMATIVE ACT**, consented to by the defendant in person, or by his attorneys, with the leave of the court. *Montgomery v. Murphy*, 652.
2. **COURT WILL NOT SANCTION EXTENSION OF PRACTICE OF CLERKS TO TAKE MINUTES AND DOCKET ENTRIES OF PROCEEDINGS**, and to subsequently enter them at length in technical language, according to established

- forms, to a case in which the clerk made the single entry of "judgment," and then, out of court, fixed the liability of the parties from mere recollections as to how the judgment should be entered at length. *Id.*
3. COURT ACTS IN EXERCISE OF ITS QUASI EQUITABLE POWERS IN DECIDING UPON APPLICATION TO STRIKE OUT JUDGMENT after the term is past, for any of the reasons mentioned in the Maryland act of 1787, and will, therefore, properly consider all the facts and circumstances of the case, and require that the party making the application shall appear to have acted in good faith, and with ordinary diligence. *Id.*
  4. JUDGMENT RECORDS ARE PRESUMED TO HAVE BEEN MADE AFTER MOST CAREFUL DELIBERATION, and to permit them to be altered or amended without the most solemn forms of proceeding would be contrary to law and good policy. *Id.*
  5. DEFENDANT IS ESTOPPED FROM DENYING VALIDITY OF JUDGMENT BY CONFESSION, where in the statement therefor he admits that a sum certain is due plaintiff, and consents to the rendition of judgment for that sum, notwithstanding the statement is so defective in setting out the facts out of which the indebtedness arose that the judgment is invalid as to creditors other than the judgment creditor. *Plummer v. Douglass*, 456.
  6. IT IS NOT GROUND FOR REVERSAL THAT VERDICT WAS RETURNED AT HALFPAST TEN O'CLOCK, P. M., and the judgment was not entered upon the docket until the next day at eleven o'clock, A. M., though the statute provides that the judgment on a verdict shall be entered upon the docket forthwith. *Davis v. Simma*, 462.
  7. REVIVAL OF JUDGMENT IN NAME OF ADMINISTRATOR results from the filing of his appointment for record, and an execution may issue in his name. *Durham v. Heaton*, 275.
  8. LIEN ON JUDGMENT IS GIVEN TO ALL COURTS OF RECORD, and a judgment in the supreme court creates a lien co-extensive with the jurisdiction of that court. *Id.*
  9. LIEN OF JUDGMENT IS NOT RELEASED BY DEATH OF JUDGMENT CREDITOR. *Id.*
  10. COURT WILL TREAT FOREIGN JUDGMENT as would the state where it was rendered, and words of a record from a state where forms of action have been abolished will not be given the same strict technical signification which they have where those forms are retained. *Griffin v. Eaton*, 233.
  11. DECLARATION IN DEBT IN STATE WHERE FORMS OF ACTION ARE RETAINED is sustained by proof of judgment on a promissory note for a gross sum of principal and interest obtained in a state where forms of action are abolished. *Id.*

See EQUITY, 7; EXECUTIONS; WILLS, 7-9.

### JURISDICTION.

LEGAL PRESUMPTION, IN ABSENCE OF CONTRADICTIONARY EVIDENCE, IS IN FAVOR OF JURISDICTION of court of record of another state, which has assumed to exercise jurisdiction over the subject-matter in controversy between parties residing there. Thus, under an order of a court of record of another state that certain property should be discharged from a mortgage thereon, upon the filing in court, within a specified time, of a bond, with sureties to be approved by the clerk, and with condition to pay the sum, if any, which should be found due upon the mortgage debt, a duly certified copy of the record of the court, showing that a bond



was received and placed on file by the clerk, and subsequent proceedings had which necessarily implied an approval and acceptance of the bond, is sufficient to prove the discharge of the property from the mortgage. *Begum v. Stimpson*, 767.

See ESTATES OF DECEDENTS; EXECUTORS AND ADMINISTRATORS, 2.

## JURY AND JURORS.

1. JURY CANNOT LAWFULLY, FROM MERE CAPRICE, DISREGARD TESTIMONY OF UNIMPEACHED WITNESS, although they are the judges of the credibility of witnesses. They must exercise their judgment, and not their will, when passing upon the credibility of a witness. *Robertson v. Dodge*, 267.
2. JURORS SHOULD TEST TRUTH AND WEIGHT OF EVIDENCE, WHEN HEARD, by their general knowledge derived from experience, observation, and reflection; and an instruction to them to apply special circumstances and facts connected with the case in forming their verdict is erroneous. *Ottawa Gas Light Co. v. Graham*, 263.
3. JUROR HAVING KNOWLEDGE OF FACTS NOT IN EVIDENCE has no right to consider them in making up a verdict. Before he can do so, he should be sworn and testify to the facts, precisely as any other witness. *Id.*

See CRIMINAL LAW, 21-23.

## LARCENY.

See CRIMINAL LAW, 80.

## LEASES.

See DEEDS.

## LEGISLATURE.

See CONSTITUTIONAL LAW; STATUTES, 2, 3.

## LEGITIMACY.

1. DECLARATIONS OF DECEASED MOTHER THAT HER CHILD WAS BORN BEFORE MARRIAGE, and corroborating statements made by her touching the circumstances and history of her life, are admissible in evidence to prove the illegitimacy of the child. *Haddock v. Boston and Maine R. R.*, 656.
2. EVIDENCE OF GENERAL REPUTATION THAT CHILD WAS ILLEGITIMATE is not competent. The admission of hearsay to prove the pedigree of a person is restricted to the declarations of deceased persons who were related to him by blood or marriage. *Id.*

## LETTERS.

See EVIDENCE, 6.

## LIBEL.

1. LIBEL AND SLANDER. — WORDS SPOKEN OR WRITTEN BY COURT, the parties or counsel, in the due course of judicial proceedings, if relevant, are not actionable, but are absolutely privileged communications, and although irrelevant, do not constitute a cause of action unless they are in fact malicious. In such case, proof of actual malice is upon complainant. *Lawson v. Hicks*, 49.

2. IN ACTION OF SLANDER OR LIBEL, malice is usually inferred by law from the defamatory matter itself; and when so inferred, is denominated legal malice, in contradistinction to malice in fact. Where this legal inference of malice is drawn, the absence of express malice is no justification, although it is to be considered in mitigation of damages. *Id.*
3. LIBEL AND SLANDER. — INFERENCE OF MALICE is not drawn as matter of law when words are written or spoken by parties or counsel in the due course of judicial proceedings, although they may be irrelevant; and the plaintiff is compelled to base his recovery upon malice in fact. The question of malice is purely an inquiry for the jury. *Id.*
4. LIBEL AND SLANDER. — WORDS SPOKEN OR WRITTEN in the course of judicial proceedings, though irrelevant, are not actionable, unless it affirmatively appears that they were malicious and uttered without reasonable or probable cause to believe them relevant. This question of reasonable or probable cause of belief is for the jury in determining the question of malice. *Id.*
5. IN ACTION OF LIBEL OR SLANDER, averment of want of "justifiable cause or excuse" to believe the defamatory matter relevant is not equivalent to the averment of "want of reasonable or probable cause," required by the Alabama statute. *Id.*
6. IT IS NO JUSTIFICATION FOR WRITING LIBELOUS LETTER TO WOMAN concerning her suitor, that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to its contents. "*Count Joannes*" v. *Bennett*, 738.
7. IN ACTION OF LIBEL, CROSS-INTERROGATORIES signed by defendant in his handwriting, and found in the clerk's office, are evidence so conducing to show publication as to admit them in evidence, and leave the question of publication to the jury. *Lanson v. Hicks*, 49.

#### LICENSE.

1. FUTURE ENJOYMENT OF EXERCISED PAROL LICENSE, granted upon a consideration, or upon the faith of which money has been expended, will be enforced in equity, at all events, where adequate compensation in damages cannot be obtained; although, at law, a parol license is revocable as to future enjoyment, and is determined by a conveyance of the estate upon which it was to be enjoyed. *Snowden v. Wilas*, 370.
2. GRANTEE OF LAND ARE BOUND BY IRREVOCABLE LICENSE, when they purchase with notice; and in case of a mill and dam, the existing condition of things might be notice. *Id.*
3. LICENSE TO ENTER UPON AND OCCUPY LAND MUST BE SPECIALLY PLEADED, under the code, as well as at common law, or it cannot be given in evidence without consent, and consent will not be presumed. *Id.*
4. LICENSE TO DO ACT UPON LAND OF ANOTHER MAY BE GIVEN BY PAROL, if it does not involve an interest in real estate, or amount to an easement; and if coupled with an interest, especially if it be upon a consideration, it cannot be revoked. *Id.*

#### LIENS.

See ATTORNEY AND CLIENT, 8; ESTATES OF DECEDENTS, 2, 3; EXERCISES, 5, 10, 11; JUDGMENTS, 9, 10; VENDOR AND VENDER, 7, 13.

#### MALICE.

See ATTACHMENT, 4; DAMAGES, 3; NUISANCE, 1

**MALPRACTICE.**

See **PHYSICIANS AND SURGEONS.**

**MANDAMUS.**

1. WRIT OF MANDAMUS IS SUMMARY REMEDY, FOR WANT OF SPECIFIC ONE, where there would otherwise be a failure of justice. *State v. Graves*, 639.
2. WRIT OF MANDAMUS IS NOT WRIT OF RIGHT, and is not granted as of course, but only at the discretion of the court to whom the application is made; and this discretion will not be exercised in favor of applicants, unless some just or useful purpose may be answered by the writ. *Id.*

**MANSLAUGHTER.**

See **CRIMINAL LAW**, 10-20.

**MARRIAGE AND DIVORCE.**

1. MARRIAGE, ACCORDING TO JUS GENTIUM, IS UNION OF ONE MAN AND ONE WOMAN, so long as they both shall live, to the exclusion of all others, by an obligation, which, during that time, the parties cannot, of their own volition and act, dissolve, but which can be dissolved only by the state. *Roche v. Washington*, 376.
2. VALIDITY OF MARRIAGE BETWEEN INDIANS IS TO BE TESTED BY LAW OF STATE in which it is contracted, and not by the customs of the tribe, which had removed beyond the limits of the state. *Id.*
3. "HABITUAL INTEMPERANCE," WITHIN MEANING OF DIVORCE STATUTE, is not necessarily the habit of drinking intoxicating liquors to such excess as to render the party at all times incapable of attending to business; but if there be a habit of drinking to excess in such degree as to render the party incapable of attending to his business during the principal portion of the time usually devoted to business, it amounts to habitual intemperance. *Mahone v. Mahone*, 91.
4. "EXTREME CRUELTY," WITHIN MEANING OF DIVORCE LAWS, need not be persistent and become a fixed habit, before relief and safety can be had by divorce; and in an action for divorce on this ground it is error for the court to charge that "the acts must be persistent, and the cruelty must be so extreme in its nature that in itself it furnishes an apprehension that the continuance of the cohabitation would be attended with bodily harm to the wife." *Id.*

See **DEEDS**, 4; **HUSBAND AND WIFE**; **LEGITIMACY.**

**MARRIED WOMEN.**

1. CONVEYANCES BY WIFE SHOULD BE STRICTLY CONSTRUED TO PROTECT HER RIGHT. *Sharp v. Bailey*, 489.
2. NEGLIGENCE OF WIFE IN EXECUTING, WITHOUT READING, TRUST DEED CONVEYING HOMESTEAD, among other property, upon the statement of her husband that it conveyed certain property mentioned, which did not include the homestead, the trustee and beneficiary having no knowledge of and being in no wise a party to this false representation, cannot be set up by her as against the innocent parties who acted in good faith in the transaction, so as to make it the ground for relief against the consequences of her own signature. *McHenry v. Day*, 438.

3. WIFE WILL NOT BE PERMITTED TO TAKE ADVANTAGE of her own irregular and wrongful acts in the acknowledgment of a deed, against parties who, being ignorant of such acts, have loaned money upon the security thus acknowledged, but which is regular and fair on its face. *Id.*
  4. DECLARATIONS AND ACTS LEADING TO AND INDUCING EXECUTION OF MORTGAGE BY MARRIED WOMAN are admissible as part of the *res gestæ*, where she denies the validity of the mortgage on the ground that she was forced to execute it by menaces and threats of her husband. *Central Bank v. Copeland*, 597.
- See ACKNOWLEDGMENTS; DOWER; DURESS; HUSBAND AND WIFE; MORTGAGES, 11.

#### MASTER AND SERVANT.

EMPLOYER IS LIABLE FOR PERSONAL INJURIES SUSTAINED BY REASON OF CARELESSNESS OF HIS EMPLOYEE who is engaged in work done under a general employment for a reasonable compensation or for a stipulated price, when the employer retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient. *Brackett v. Lobb*, 694.

#### MEXICAN GRANTS.

See PUBLIC LANDS.

#### MINORS.

See DOMICILE; MINORS; GUARDIAN AND WARD.

#### MISTAKE.

1. PURE MISTAKE OF LAW UNATTENDED WITH MISREPRESENTATIONS, UNDOE INFLUENCE, MISPLACED CONFIDENCE, or other special circumstances of a similar character, is not ground for equitable relief against a contract. *Kenyon v. Welty*, 137.
2. "MISTAKE" IN STATUTE CONFERRING JURISDICTION IN EQUITY IN CASES OF MISTAKE, if not in terms limited to mistakes of fact, may be presumed to have been used as it is generally understood in equity. *Jordan v. Stevens*, 556.
3. RELIEF WILL NEVER BE GRANTED MERELY ON ACCOUNT OF MISTAKE OF LAW, but there are cases where there are other elements not in themselves sufficient to authorize the court to interpose, but which, combined with such a mistake, will entitle the party to relief. *Id.*
4. TWO FACTS HAVE BEEN FOUND IN ADDITION TO MISTAKE OF LAW in nearly all cases where relief has been granted; namely, that there has been a marked disparity in the position and intelligence of the parties, so that they have not been on equal terms; and that the party obtaining the property persuaded or induced the other to part with it, so that there has been "undue influence" on the one side and "undue confidence" on the other. *Id.*
5. COMPROMISES MADE UNDER MISTAKE OF LAW ARE UPHOLD IN EQUITY; but if the parties are not on equal terms, and one misleads the other, and obtains property thereby, against right and equity, as well as against law, he will be compelled to restore it. *Id.*
6. EQUITY WILL, IF POSSIBLE, RESTORE BOTH PARTIES TO SAME CONDITION AS BEFORE, where they have acted under a mistake of law, though there

be no actual fraud, if one is unduly influenced and misled by the other, to do that which he would not have done but for such influence, and he has, in consequence, conveyed property to the other without any consideration, or purchased what was already legally his own. *Id.*

7. **MONEY PAID OR PROPERTY TRANSFERRED UNDER MISTAKE OR IGNORANCE OF LAW**, with full knowledge of the facts, and in the absence of fraud, cannot be recovered back at law or in equity, the rule being equally stringent in both jurisdictions. *Freeman v. Curtis*, 564.
8. **WHERE MISTAKE IS ONE BOTH OF LAW AND FACT**, though the latter is the result of the former, relief will be granted when justice and equity require it. *Id.*
9. **RECONVEYANCE OF REAL ESTATE CONVEYED UNDER MISTAKE OF LAW, AND CONSEQUENT MISTAKE OF FACT**, will be decreed where there was no consideration for the conveyance, the means used to obtain it were improper, and the grantee of the property ought not in good conscience to retain it. *Id.*
10. **HEIRS WHO CONVEY THEIR INTERESTS IN ESTATE TO ANOTHER UNDER IGNORANCE OF LAW** of descent, and a consequent mistake of fact that they are not the only heirs, will be decreed a reconveyance in equity, where the grantee, who had no legal interest in the estate, represented that it was doubtful whether they were the only heirs, and exhibited deeds from other persons, claiming to be heirs, conveying their interests in the estate to him, the better to enable him to contest a will which disposed of a portion of the property to strangers, he at the same time executing an agreement to pay them out of the proceeds of the estate their several shares; and upon this showing, the plaintiffs, in ignorance of their sole heirship, and without any consideration, conveyed to him their interest in the estate, receiving in return an agreement to pay them each one twelfth or in all one sixth of the proceeds of the estate; and a reconveyance should be decreed whether or not the grantee was aware of the sole heirship of the plaintiffs, because, if so, his action was fraudulent; and if not, then the means used to obtain the conveyance were improper, no consideration was paid, and he ought not in good conscience to retain the property. *Id.*

See EQUITY, 4; GUARDIAN AND WARD, 14.

#### MORTGAGES.

1. **MORTGAGE OF LANDS IS REGARDED IN EQUITY AS MERE SECURITY FOR MONEY**, a chattel interest or chose in action, the debt being considered as the principal, and the mortgage as the accessory, or appurtenant thereto. *Timms v. Shannon*, 632.
2. **WHERE MORTGAGEE INSTITUTES ACTION AT LAW UPON NOTE SECURED**, instead of proceeding to foreclose the mortgage, the judgment is, as between the parties, a lien upon the mortgaged premises from the date of recording the mortgage. *Christy v. Dyer*, 493.
3. **MORTGAGE EXECUTED TO SECURE PURCHASE-MONEY OF PREMISES AFTERWARDS OCCUPIED AS HOMESTEAD**, need not be signed and concurred in by the wife of the mortgagor. *Id.*
4. **TRANSFER OF NOTE CARRIES WITH IT MORTGAGE GIVEN TO SECURE IT**. *Herring v. Woodhull*, 296.
5. **INDORSEMENT OF NOTE AND MORTGAGE TO TWO INDORSERS** entitles each to one half the note and its proceeds and to one half the mortgage security, and neither can transfer any other or greater interest therein. *Id.*

6. MORTGAGE GIVEN AND RECORDED WHEN EXECUTED to secure advancements, to be made to the mortgagor, or liabilities to be assumed for him by the mortgagee in future, will be upheld and enforced as against subsequent mortgages, as to all advancements made or liabilities assumed prior to the execution of such subsequent mortgages. *Boncell v. Goodwin*, 169.
7. MORTGAGE GIVEN AND RECORDED TO SECURE ADVANCEMENTS to be made to the mortgagor or liabilities to be assumed for him by the mortgagee in future will not take precedence of a subsequent mortgage, also recorded, and upon which advancements have been made, when the prior mortgagee with notice in fact assumes an original liability, which he is not compelled to do, after the subsequent mortgage is executed and advancements made thereon. *Id.*
8. WHEN ONE HAS ACTUALLY MADE OR UNDERTAKEN TO MAKE ADVANCEMENTS, or assumed or undertaken to assume liabilities for another, and has taken a mortgage for indemnity, which he has recorded, his encumbrance is consummated and cannot be defeated by a subsequent mortgage. But when, without some further act to be done by him, the mortgage has, and can have, no effect, and where it is optional with him to do such act or not, whether he should not be required, until he does such act, to recognize the intervening rights acquired by others, and be held chargeable with notice of the state of the mortgagor's title, disclosed by the public records when the act is done, *quære. Id.*
9. ASSIGNEE OF INTEREST IN MORTGAGE CANNOT CLAIM IN ANY OTHER OR STRONGER RIGHT than that of the assignor. *Central Bank v. Copeland*, 597.
10. ACTION WILL LIE TO FORECLOSE MORTGAGE AGAINST ESTATE OF DECEASED MORTGAGOR, although the debt secured by the mortgage has been presented and duly allowed, but no judgment can be entered up for any deficiency which may remain after the application of the proceeds of the sale. *Fallon v. Butler*, 140.
11. WIFE OF MORTGAGOR NEED NOT BE MADE PARTY UPON FORECLOSURE of a mortgage given to secure payment of the purchase-money. *Stephens v. Bicknell*, 242.
12. STRICT FORECLOSURE MAY BE DECREED, AND GENERALLY WILL BE, where the premises are not worth the face of the mortgage, and the mortgagor is insolvent. *Id.*
13. DECREE IN ACTION TO FORECLOSE MORTGAGE CONCLUDES RIGHTS OF ALL PARTIES TO ACTION, and the sale thereunder, consummated by the sheriff's deed, passes, as against them, the entire estate held by the mortgagor at the date of the mortgage. *Montgomery v. Middlemiss*, 146.
14. DECREE MAY BE HAD AGAINST ONE OF TWO JOINT MORTGAGORS, where, after giving the mortgage, they partition the premises, agree to each pay a specified portion of the purchase-money, to secure the payment of which the mortgage was made, and one of them does pay his share, and secures a release as to his portion. *Stephens v. Bicknell*, 242.
15. AS AGAINST PARTIES TO FORECLOSURE SUIT, PURCHASER AT FORECLOSURE SALE IS ENTITLED, upon the receipt of his deed, to the possession of the premises, and to the aid of the court in enforcing its delivery; and the right to this aid is not affected by the fact that, pending the action, the plaintiff may have executed to one of the parties defendant a conveyance of the whole or a part of the premises embraced in the decree. *Montgomery v. Middlemiss*, 146.

16. **STATE OFFICERS ARE NOT BOUND TO OFFER FOR SALE, IN PARCELS, lands mortgaged to trust funds; but they may do so, if necessary, to enable them to realize the amount of the debt and costs.** *Bansemmer v. Mace*, 344.
17. **SALE IN LUMP OF SEVERAL DISTINCT PARCELS OF LAND, COVERED BY ONE MORTGAGE, upon foreclosure, is ground for setting aside the sale, and ordering a resale.** *Lay v. Gibbons*, 487.
18. **HOMESTEAD OF MORTGAGOR, EMBRACED IN MORTGAGE WITH OTHER DISTINCT TRACTS OF LAND, should not be sold on foreclosure except to supply the deficiency remaining after selling the other tracts.** *Id.*
19. **WHERE MORTGAGE OF RAILROAD AND ITS PROPERTY authorizes a sale upon failure to pay either the principal or interest to satisfy "the amount claimed and due," but contains no provision that the principal shall become due upon a failure to pay interest, until such principal becomes due the bond-holders have no right to insist on payment of it by foreclosure or otherwise. But they have a right to a sale for the interest due; and if the property is divisible, it would be proper to order a sale of only so much as might satisfy the amount due. If it is not susceptible of division, it must be sold or leased as an entirety.** *Bardstown etc. R. R. Co. v. Metcalfe*, 541.
20. **WHERE MORTGAGE OF RAILROAD AND ITS PROPERTY authorizes a sale upon failure to pay either the interest or principal "to satisfy the amount claimed and due," and the property is worth much more than the debt and interest, it may be leased at public auction, for the shortest term that will bring the amount due, and accruing interest and principal as the same shall become due. If no lessee is found, then it may be sold absolutely, the company to elect whether or not the property shall be offered in the first instance for a term of years, and if sold, the purchaser to give bonds, with approved security, for the purchase-money, including the accruing interest and principal, and a lien on the property should be reserved as additional security. If leased, the lessee should be required to give a covenant, with approved security, to keep in good repair the road and property, and to return the same to the company at the end of the term in as good condition as it may be when received: An inventory of the property should be filed in the cause and declared in the decree ordering the lease, to be conclusive evidence of the condition and value of the property at the time of the lease.** *Id.*
21. **OWNER OF EQUITY OF REDEMPTION OF LAND MAY MAINTAIN ACTION FOR ITS POSSESSION against any one except the mortgagee and those claiming under him.** *Stinson v. Ross*, 591.
22. **JUNIOR MORTGAGEE HAS RIGHT TO REDEEM UNDER STATUTE, when not made party to suit to foreclose prior mortgage, and he also retains his equitable right to redeem, unaffected by the foreclosure. If made a party to the foreclosure suit, his equitable right to redeem is barred, but he is still a redemptioner under the statute.** *Frink v. Murphy*, 149.
23. **ALTHOUGH DECREE IN FORECLOSURE SUIT ASCERTAINS AMOUNT OF JUNIOR ENCUMBRANCE'S LIEN, and directs its payment out of any surplus remaining after satisfaction of the prior lien, his statutory right to redeem still exists as to any portion of his demand not satisfied by the application of such surplus.** *Id.*
24. **PHRASE "ON WHICH THE PROPERTY WAS SOLD," IN CALIFORNIA PRACTICE ACT, SECTION 230, has reference to the lien which the action was brought to enforce, and does not apply to the liens of subsequent encumbrancers who are made parties.** *Id.*



25. PURCHASER AT SALE UNDER DECREE OF FORECLOSURE OF MORTGAGE IS ENTITLED TO WRIT OF ASSISTANCE, although such decree does not direct the delivery of possession, and although at the time of the application no preliminary order for such delivery has been made by the court. *Montgomery v. Middlemiss*, 146.
  26. TO OBTAIN WRIT OF ASSISTANCE AGAINST PARTIES TO FORECLOSURE, and those claiming with notice under them after commencement of suit to foreclose, it is only requisite to furnish the court proper evidence of a presentation of the deed to them, a demand of the possession, and their refusal to surrender. *Id.*
  27. CHATTEL MORTGAGE MAY BE VOID for uncertainty as well as a mortgage of real estate. *Golden v. Cockril*, 510.
  28. INSTANCES OF SUFFICIENT AND INSUFFICIENT description of chattels in mortgage thereof given, and general principle deduced that any description which will enable third persons to identify the property, aided by inquiries which the mortgage indicates and directs, is sufficient. *Id.*
  29. DESCRIPTION OF PROPERTY IN CHATTEL MORTGAGE as "124 head of mules, now in the territory of Kansas," and "one pair of claybank horses," is not sufficient. *Id.*
  30. DELIVERY OF CHATTELS, EITHER ACTUAL OR CONSTRUCTIVE, is essential to the validity of a mortgage thereof, as against third parties. Registration dispenses with delivery. *Id.*
  31. CHATTEL MORTGAGE OF PROPERTY situated in Kansas, executed and recorded in another state, where the mortgagor resides, without any change of possession, is not notice to nor valid as against attaching creditors of the mortgagor in the former state. *Id.*
- See ACKNOWLEDGMENTS, 3, 4; ATTACHMENT, 1; CORPORATIONS, 8-12, 22; EQUITY, 2; EVIDENCE, 4; HOMESTEADS, 10, 11; HUSBAND AND WIFE, 2; RAILROADS, 2, 3; STATUTE OF LIMITATIONS, 4; USURY, 4-7.

#### MUNICIPAL CORPORATIONS.

See CORPORATIONS, 28-41; EMINENT DOMAIN; HIGHWAYS, 4-6; NEGLIGENCE, 8.

#### MURDER.

See CRIMINAL LAW, 10-20, 22.

#### NAVIGABLE STREAMS.

See WATERCOURSES.

#### NEGLIGENCE.

1. WHAT IS REASONABLE OR DUE CARE DEPENDS ON SUBJECT-MATTER to which care is to be applied, and the attendant circumstances. *Davis v. Winslow*, 573.
2. NEGLIGENCE CONSISTS IN OMITTING TO DO SOMETHING that a reasonable man would do, or in doing something that a reasonable man would not do, causing, unintentionally, mischief to another. *Id.*
3. DEAF PERSON IS GUILTY OF NEGLIGENCE, who attempts to drive an unmanageable horse across a railroad track when a train is approaching. It is his duty to keep a vigilant lookout, in order to see and avoid the danger. *Illinois Central R. R. Co. v. Buckner*, 282.

4. **PERSON MUST HIMSELF SUFFER CONSEQUENCES OF CARELESS ACT**, no matter what motive may have prompted the act. *Id.*
  5. **NEGLIGENCE IS IMPLIED FROM ESCAPE OF FIRE FROM LOCOMOTIVE ENGINE**, and the burden of proof is upon the railroad company, in an action against it for such negligence, to show that the most approved mechanical contrivances were used to prevent the escape of fire. *Bass v. Chicago etc. R. R. Co.*, 254.
  6. **RAILROAD COMPANY IS GUILTY OF NEGLIGENCE**, in suffering dry grass and rubbish to be upon its right of way, or in permitting vegetation to grow thereon to such a height and density as to conceal cattle from view. *Id.*
  7. **OWNER OF SUCKING COLT KICKED AND KILLED BY HORSE** which has been turned loose in the highway, without a keeper, while it is following its dam led by her owner in the highway, he being in the exercise of reasonable care, may recover damages of the owner of the horse, although the horse was not vicious. *Barnes v. Chapin*, 710.
  8. **MUNICIPAL CORPORATION IS LIABLE FOR CARELESSNESS OR NEGLECT OF ITS AGENTS** in the construction of public works, on the same principle that a natural person is liable for damages resulting from his carelessness, unskillfulness, or wrong-doing. *Templin v. Iowa City*, 455.
- See ANIMALS**, 10; **COMMON CARRIERS**; **CORPORATIONS**, 27; **DAMAGES**, 3; **MARRIED WOMEN**, 2, 3; **MASTER AND SERVANT**; **PHYSICIANS AND SURGEONS**.

#### NEGOTIABLE INSTRUMENTS.

1. **CERTIFICATE OF DEPOSIT IS NEGOTIABLE INSTRUMENT**, when it is payable to the depositor or order, on demand, on return of the certificate, and the bank has a right, upon demand of payment, to insist that the certificate should be produced and delivered up, as its voucher of payment, and as security against any future claim. *Fell's Point Savings Institution v. Weedon*, 603.
2. **NEGOTIABLE INSTRUMENT, IF LOST, CANNOT BE RECOVERED ON AT LAW**. The only remedy is chancery. *Id.*
3. **TERMS "CURRENCY," "FUNDS," AND "CURRENT FUNDS," DEFINED**. *Galena Ins. Co. v. Kupfer*, 284.
4. **HOLDER OF CHECK DRAWN FOR "CURRENT FUNDS" MAY DEMAND COIN**, or funds equal in value to the current coin of the country. *Id.*
5. **PARTY DRAWING UPON ANOTHER FOR CURRENT FUNDS MUST PROVIDE SUCH FUNDS** for payment of the draft, and failing to do so, it is the same as if no funds were provided. *Id.*
6. **HOLDER OF CHECK DRAWN FOR CURRENT FUNDS IS NOT BOUND TO RECEIVE DEPRECIATED PAPER**, in a case where the drawer of the check has not provided proper funds for its payment. *Id.*
7. **HOLDER OF PROMISSORY NOTES IS NOT BOUND TO RECEIVE, IN PAYMENT OF the same, currency or anything other than coin or money at its true value**; and holder, who is mere agent, has no right, unless specially authorized so to do, to accept anything else in lieu of money; and a payment in currency to the holder, who is merely an agent for collection, does not, in the absence of authority specially conferred or ratified, or of a custom known to the principal, amount to a discharge of the notes. *Graydon etc. v. Patterson & Co.*, 432.
8. **WORDS "WITH EXCHANGE" IN NOTE ARE UNMEANING, AND MAY BE REJECTED** as surplusage, and therefore do not affect the note in any way. *Clouser v. Stone*, 299.

9. **MAKER BECOMES LIABLE UPON NOTE MADE PAYABLE TO HIS OWN ORDER** by indorsement and delivery thereof. *Hall v. Burton*, 310.
10. **OWNER OF LOST NOTE CANNOT MAINTAIN ACTION AT LAW AGAINST INDORSER**, in a case where a bond to indemnify the defendant against being called on a second time to pay the note will not afford him an adequate protection. *Tuttle v. Standish*, 712.
11. **DEFENSE THAT PLAINTIFF PROCURED INDORSEMENT OF PROMISSORY NOTE BY UNDUE INFLUENCE** from the payee, when he was of unsound mind and incapable of making a valid indorsement, is not available in an action by the indorsee against the maker, if neither the payee nor his representatives have ever disaffirmed the indorsement; nor is it a defense to such action that the payee, for a valuable consideration, agreed to give up the note at his death to the maker, reserving meantime the right to collect the interest thereon. *Carrier v. Sears*, 707.
12. **INDORSEMENT MAY BE MADE ON FACE OF BILL OR NOTE**; and any form is sufficient which manifests an intention to transfer it. *Herring v. Woodhull*, 296.
13. **INDORSEMENT IN FORM OF GUARANTY TRANSFERS TITLE IN NOTE TO HOLDER** as an indorsee. *Id.*
14. **INDORSEMENT OF DRAFT BY HUSBAND TO WIFE**, and her subsequent indorsement of it, with his assent, to another, are sufficient to vest a valid title in the latter. *Slawson v. Loring*, 750.
15. **DRAFT BINDS ACCEPTOR PERSONALLY**, though addressed to and accepted by him as agent, if it fails to disclose his principal on its face. Thus the acceptor was held personally liable on a draft in this form, viz.: "Office of the P. L. M. Co., Hancock, Mich., June 5, 1861, E. T. L., Agent. At four months' sight, pay to the order of L. H. S. four hundred dollars, and charge the same to the account of this company." Signed, "I. R. J., Agent," and accepted by "E. T. L., Agent." *Id.*
16. **MAKER OF NOTE IS NOT ESTOPPED BY HIS REPRESENTATIONS** made to the holder, after he has become the owner thereof, to the effect that the note is all right, and would be paid; nor is the maker bound by such representations, when repeated by the holder to one to whom he sold the note. *Jones v. Dorr*, 406.
17. **PROTEST SHOULD DESIGNATE OR IDENTIFY NOTE TO WHICH IT REFERS**, which is usually done by putting on it a copy of the note; but if the original note itself be annexed, and referred to in the body of the protest, it is sufficient. *Fulton v. Maccracken*, 620.
18. **PROTEST IS SUFFICIENT TO ADMIT IT AS EVIDENCE**, if memorandum is indorsed thereon of the maker of the note, amount, and date of protest. *Id.*
19. **NOTARY'S NAME MAY BE PRINTED TO NOTICE OF PROTEST**, instead of being signed by him in his own handwriting. All that is required is that the notarial certificate should appear to the act of the officer. *Id.*
20. **TESTIMONY OF WITNESS IS SUFFICIENTLY DEFINITE TO BE SUBMITTED TO JURY**, where, after testifying cautiously and hesitatingly as to sending notices of protest, he said on cross-examination that while he had no doubt that he did mail the notices, he could not say that he distinctly remembered the precise fact. *Id.*
21. **NOTICE OF DISHONOR OF NOTE IS NOT NECESSARY** to entitle an accommodation indorser to recover from prior parties on the paper for whose benefit the note was indorsed. *Id.*

See ASSIGNMENTS; STATUTE OF LIMITATIONS, 4; USURY, 4, 5.

## NEW TRIALS.

See PLEADING AND PRACTICE.

## NOTARIES.

See NEGOTIABLE INSTRUMENTS, 19.

## NOTICE.

**ADVERTISEMENT OF SALE OF LANDS MORTGAGED TO TRUST FUNDS**, which has been published for sixty days before the day of sale, is sufficient, and is not vitiated by the fact that in the description of the lands such abbreviations as these are used: "The w. hf. of the n. w. qr. of sec. 35, in t. 23 n., of r. 4 w." *Bansemmer v. Mace*, 344.

See EXECUTIONS, 4; EXECUTORS AND ADMINISTRATORS, 2, 4, 5; LICENSER, 2; NEGOTIABLE INSTRUMENTS, 19, 21.

## NUISANCE.

1. IF ONE, FOR HIS OWN BENEFIT, VIOLATES RIGHTS OF ANOTHER, it is a nuisance, and express malice is not necessary; and if a public right is violated, indictment is the appropriate remedy for its vindication and redress. *Davis v. Winslow*, 573.

2. NUISANCE IS DISTINGUISHABLE FROM TRESPASS, SINCE IT CONSISTS IN USE OF ONE'S OWN PROPERTY in such a manner as to cause injury to the property or other right or interest of another. *Norcross v. Thoma*, 588.

3. LAWFUL AS WELL AS UNLAWFUL BUSINESS MAY BE CARRIED ON so as to prove a nuisance. It is the injury, annoyance, inconvenience, or discomfort thus occasioned that the law regards, and not the particular business from which these result. *Id.*

4. PARTY INJURED BY NUISANCE MAY RECOVER COMPENSATION IN CIVIL SUIT upon proof of special and peculiar damage to himself, though the nuisance be public, rendering the guilty party liable to indictment. *Id.*

5. BUSINESS OF BLACKSMITH MUST BE CARRIED ON SO AS NOT TO INJURE OTHERS, and it is a nuisance where it is carried on in a shop twelve feet distant from a hotel, and causes, by reason of the cinders, dust, and ashes arising from the shop, serious annoyance and inconvenience to the guests of the hotel, and consequent loss to the hotel-owner. *Id.*

6. OWNER OF LOWER MINING CLAIM UPON WHICH REFUSE MATTER HAS BEEN AND IS BEING WASHED from a higher claim is entitled to damages for the injury sustained, and to an injunction to restrain the upper proprietor from continuing such acts, where it appears that plaintiff had first located his claim, and that the flow of such refuse matter interfered with and defeated the object for which plaintiff's claim was located and taken possession of. The rule, *Qui prior est in tempore potior est in jure*, applies in such cases; and the position that so long as the use made by defendant of his claims is not in itself unlawful, plaintiff cannot complain of its effect upon him, is untenable because no use is lawful which precludes plaintiff from the enjoyment of his rights. *Logan v. Driscoll*, 90.

See ANIMALS, 7-9; DAMAGES, 4.

## OFFICE AND OFFICERS.

1. OFFICE MAY BECOME VACANT BY OFFICER'S ABANDONMENT AND REMOVAL from the state, and this, without a judicial declaration of the vacancy. *State v. Jones*, 403.

2. **VACANT OFFICE MAY BE FILLED BY ELECTION AND APPOINTMENT BEFORE JUDICIAL DECLARATION OF VACANCY** is procured, where it appears *prima facie* that acts or events have occurred subjecting the office to such a declaration of vacancy; but if the person so selected or appointed, in attempting to take possession of the office, be resisted by the previous incumbent, he will be compelled to try the right in some mode prescribed by the law. *Id.*
3. **PERSON ELECTED OR APPOINTED TO OFFICE BEFORE IT IS JUDICIALLY DECLARED VACANT MAY TAKE POSSESSION**, if he finds the office in fact vacant, and can take possession uncontested by the former incumbent; and as long as he remains in possession, he will be an officer *de facto*; and should the former incumbent never appear to contest his right, he will be regarded as having been an officer *de facto* and *de jure*; but if the former incumbent appear, the burden is upon him of proceeding to oust the then actual incumbent; and if in such proceeding it is made to appear that facts had occurred before the appointment or election justifying a judicial declaration of a vacancy, it will then be declared to have existed, and the election or appointment will be held to have been valid. *Id.*
4. **WHERE COUNTY CLERK ACTS AS EX OFFICIO CLERK OF DIFFERENT COURTS**, process or proceedings of such courts issued or attested by him are not invalid because of the absence of the designation of the particular court of which he acts as *ex officio* clerk, provided that fact otherwise sufficiently appears upon the face of the papers; and the affixing of a seal inscribed with the name of a court is sufficient for this purpose. *Touchard v. Crow*, 108.
5. **DEPUTY COUNTY CLERK HAS EQUAL AUTHORITY WITH COUNTY CLERK** in respect to taking acknowledgments to conveyances. *Id.*
6. **AUDITOR OF STATE MAY ACT BY DEPUTY AT SALE OF LANDS** mortgaged to trust funds. And if such deputy is regularly appointed and acts in that capacity after having taken his oath of office before a person not authorized to administer such oath, he will be deemed an officer *de facto*, and his acts will be held valid in respect to third persons who may be interested, where he is not himself a party, and not, therefore, called upon to justify acts done in his official capacity. *Bansmer v. Mace*, 344.  
See ACKNOWLEDGMENTS, 2, 4; BONDS, 1; PROCESS.

#### PARENT AND CHILD.

See ADVANCEMENTS; DOMICILE; GUARDIAN AND WARD.

#### PARTIES.

See PLEADING AND PRACTICE.

#### PARTNERSHIP.

See TRUSTS, 9.

#### PHYSICIANS AND SURGEONS.

1. **FACTS AUTHORIZING RECOVERY FOR MALPRACTICE CONSTITUTE DEFENSE** to action for professional services. *Patten v. Wiggin*, 593.
2. **LAW REQUIRES THAT PERSON OFFERING HIMSELF TO PUBLIC AS PHYSICIAN OR SURGEON** be possessed of that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of his pro-

profession who are in good standing as to qualification, and which reasonably qualify him to undertake the care of patients. *Id.*

3. LAW DOES NOT REQUIRE THAT PHYSICIAN OR SURGEON SHOULD HAVE HIGHEST SKILL, or largest experience, or most thorough education, equal to the most eminent of the profession. *Id.*
4. PHYSICIAN MUST USE REASONABLE AND ORDINARY CARE AND DILIGENCE IN TREATMENT OF CASE. *Id.*
5. PHYSICIAN MUST USE HIS BEST SKILL AND JUDGMENT in deciding upon the nature of the disease, and the best mode of treatment, and the management, generally, of the patient. *Id.*
6. PHYSICIAN IS NOT WARRANTER OF CURE, AND IS NOT RESPONSIBLE FOR WANT OF SUCCESS in his treatment, unless it is proved to result from want of ordinary care, or ordinary skill and judgment. *Id.*
7. PHYSICIAN IS NOT RESPONSIBLE FOR HONEST MISTAKE OF NATURE OF DISEASE, or as to the best mode of treatment, when there was reasonable ground for doubt or uncertainty, provided he is properly qualified as a physician, and exercises the proper care. *Id.*
8. WHERE BUT ONE COURSE OF TREATMENT WOULD BE SUGGESTED BY PHYSICIANS of ordinary knowledge or skill, the adoption of any other course may be evidence of a want of ordinary knowledge, skill, or care. *Id.*
9. TREATMENT OF PHYSICIAN OF ONE PARTICULAR SCHOOL is to be tested by the general doctrines of his school, and not by those of other schools. *Id.*

See SOVEREIGNTY, 2.

#### PASSENGER CARRIERS.

See COMMON CARRIERS.

#### PATENTS TO LAND.

See PUBLIC LANDS.

#### PATENTS FOR INVENTIONS.

- ONE JOINT OWNER OF PATENT RIGHT CANNOT MAINTAIN BILL IN EQUITY against another joint owner to compel an accounting for a portion of the profits of sales of the patented article, in the absence of any special agreement. *Voss v. Singer*, 696.

#### PEDIGREE.

See LEGITIMACY, 2.

#### PENALTY.

See DAMAGES, 1.

#### PLEADING AND PRACTICE.

1. PARTIES, IN LARGER SENSE, ARE ALL PERSONS HAVING RIGHT TO CONTROL PROCEEDINGS, to make defense, to adduce and cross-examine witnesses, and appeal from the decision, if an appeal lies. Only those, therefore, who have enjoyed all of these privileges collectively should be concluded by decision, judgment, or decree. *Cecil v. Cecil*, 626.
2. ONE BECOMES PARTY TO RECORD AND MAY BE CONCLUDED BY IT, if he avails himself of the provisions of the Maryland code, and places him-

- self in a condition to appeal, by immediately notifying his intention, and having the testimony reduced to writing at his expense. *Id.*
2. **AVERMENT IN BILL THAT ONE OF TWO JOINT OWNERS OF NOTE AND MORTGAGE** was authorized by his co-owner to make an assignment thereof to complainant will be taken as confessed, where such co-owners are summoned in the suit by publication and make default. *Herring v. Woodhull*, 296.
  4. **OBJECTION TO DECLARATION IN TORT BECAUSE LAID WITH CONTINUANDS** comes too late after issue joined, and trial, and judgment rendered. If the objection is good at all, it should have been made by demurrer. *Great Western R. R. Co. v. Helm*, 226.
  5. **UNCERTAINTY IS NOT GROUND OF DEMURRER, UNDER INDIANA CODE OF PROCEDURE**, but of a motion to compel the party to make his pleading more certain, unless the pleading be so uncertain as not to state intelligibly a substantially good cause of action or defense. *Snowden v. Wilas*, 370.
  6. **DEMURRER IS TO BE TAKEN DISTRIBUTIVELY**, and is equivalent to a separate demurrer filed to each paragraph, and may therefore be overruled as to part, and sustained as to part, of the paragraphs, where an answer consists of several paragraphs, and a single demurrer is filed thereto, in which it is said that "the plaintiff demurs to each paragraph of the answer," etc. *Parker v. Thomas*, 385.
  7. **IF ANY OF SEVERAL GROUNDS OF DEFENSE** set up in answer is good, it is error to sustain a general demurrer thereto, on the ground that it does not set forth any defense to the action. *Munn v. Taubman*, 506.
  8. **PHRASE "HE SAYS THAT HE DENIES,"** in an answer, is equivalent to phrase "he denies," under the Kansas code. *Id.*
  9. **OBJECT OF ANSWER IS TO APPRISE PLAINTIFF** what defense is intended to be set up in bar of his claim. This is all the law requires. *Id.*
  10. **THAT SEVERAL GROUNDS OF DEFENSE** are inconsistent is not a defect that can be taken advantage of by demurrer. The usual and proper course is to compel the party to elect on which of the inconsistent grounds he will rely. *Id.*
  11. **SIMILITER TO PLEA OF NOT GUILTY, OR TO ANY NEGATIVE PLEA**, can be added by defendant, if he chooses to add it, and it is not error to proceed to trial without it. *Gillespie v. Smith*, 328.
  12. **SPECIFIC OBJECTIONS TO EVIDENCE MUST BE TAKEN IN LOWER COURT.** *Id.*
  13. **PARTY IS NOT PRECLUDED UNDER GENERAL OBJECTION TO EVIDENCE** from showing in appellate court the insufficiency of the evidence, or from availing himself of radical defects in the instruments of evidence which could not be obviated by proof, and which strike at the foundation of the plaintiffs' claim. *Id.*
  14. **MATTER IN AVOIDANCE, DENIED BY GENERAL REPLICATION, MUST BE PROVED.** *Cecil v. Cecil*, 626.
  15. **WHERE SPECIAL PLEA IS DEFENSE TO ACTION**, and the defense set forth is available under the general issue, the judgment will not be reversed for error in sustaining a demurrer to the plea. *Lawson v. Hicks*, 49.
  16. **PRAYER MAY RAISE QUESTION OF LAW OUT OF FACTS ENUMERATED IN IT**, and demand an opinion upon it, not as conclusive of the plaintiff's right to recover, but as ancillary to that right. *Parkhurst v. Northern Central R. R. Co.*, 648.
  17. **OBJECTION THAT CAUSE OF ACTION WAS NOT SUBMITTED TO COURT AND JURY IS SUFFICIENTLY ANSWERED** by the admission of the defendant at



- the trial that the debt was due the plaintiff, making it unnecessary for the jury to pass upon the fact thus admitted. *Id.*
18. PRAYER SHOULD NOT BE REJECTED BECAUSE APPARENTLY INDEPENDENT PROPOSITION CONTAINED IN IT IS ERRONEOUS, when it is limited by another more definite and substantial proposition, with which it is so connected as to form one entire proposition. *Id.*
  19. REJECTION OR GRANTING OF PRAYER DEPENDS FOR ITS CORRECTNESS UPON EVIDENCE to which it alone refers, and not upon the state of the pleadings, where the prayer neither points nor refers to the pleadings. *Birney v. Printing Telegraph Co.*, 610.
  20. FINDING OF FACTS MUST BE LEFT TO JURY, even where the evidence is all one side; but this is not necessary when the case is tried upon admissions made at the bar. The jury may discredit the testimony, but cannot find contrary to the agreement of the parties. *Id.*
  21. PARTY HAS PRIVILEGE OF RAISING ANY QUESTION OF LAW arising out of the facts of the case, and to demand the opinion of the court distinctly upon it; and the opposite party has the equal privilege of asking an opinion on additional facts not embraced in the hypothesis assumed by the adversary in his prayer, but not the privilege of controlling or modifying that hypothesis. *Id.*
  22. PRAYER MAY BE REJECTED AS WHOLE, where the court cannot grant the entire prayer as made, though a portion of it, in a separate, distinct form, might have been given. *Id.*
  23. PRAYER THAT PLAINTIFF IS NOT ENTITLED TO RECOVER UPON PLEADINGS AND EVIDENCE IN CAUSE IS TOO GENERAL in its terms, since the Maryland act of 1825, c. 117. *Fell's Point Savings Institution v. Weedon*, 603.
  24. PRAYER IS OBJECTIONABLE IN ASSUMING FACT AND LEAVING TO JURY QUESTION OF LAW, where it is to the effect that if the jury find "that the fund deposited" was still in bank, and that "proper" letters of administration have been taken out and granted to the plaintiff, the plaintiff was entitled to recover. *Id.*
  25. PRAYER IS DEFECTIVE IF IT DOES NOT DECLARE LAW IN TERMS EXPLICIT and intelligible to the jury upon the points raised by counsel, where it is granted by the court, after rejecting the prayers offered by the counsel. *Id.*
  26. PRAYER IS ERRONEOUS WHICH IGNORES EXISTENCE OF FACT of which there was evidence proper to be submitted to the jury, and is based upon the theory that another fact exists. *Fulton v. Maccracken*, 620.
  27. PRAYER IS NOT ERRONEOUS, AS ASSUMING EXISTENCE OF PARTNERSHIP, where the jury are left to find that the note sued upon was "discounted for the use and benefit of the defendants, under the firm name of Fulton and Linn, and that they received the proceeds of said note." *Id.*
  28. INSTRUCTION WITHOUT EITHER PROOF OR ALLEGATION authorizing it is error. *Phoenix Ins. Co. v. Lawrence*, 521.
  29. ERRONEOUS INSTRUCTION IS NOT CURED by afterwards embodying in the charge the true rule of law applicable to the point. *Horne v. State*, 499.
  30. IF COUNSEL, IN CASE TRIED BY COURT WITHOUT JURY, DESIRES TO PRESENT POINTS OF LAW, as applicable to the facts established, or sought to be established, upon which the court might be called to charge a jury, were there a jury in the case, the proper course is to present them in the form of propositions, preceding them with a statement that counsel makes the following points, or counsel contends as follows. *Touchard v. Crow*, 108.

31. COURT MAY PRESENT FACTS IN CHARGE, but must inform the jury that they are the exclusive judges of all questions of facts. *Horne v. State*, 499.
  32. CHARGE WHICH PRESENTS FACTS, or suggests a conclusion from facts, without informing the jury that they are the exclusive judges of such facts, is erroneous. *Id.*
  33. APPELLANT CANNOT TAKE ADVANTAGE OF ERRONEOUS RULING which affects the rights of parties who have not appealed, but not his own rights. *Speyer v. Ihmels*, 157.
  34. NEW TRIAL WAS GRANTED, WHERE MERITS OF CASE WERE NOT INVESTIGATED IN COURT BELOW, by reason of uncertainty as to the proper mode of procedure, although the decision below upon the main question involved was approved, and the only error disclosed might have been cured by a modification of the judgment. *Id.*
  35. NEW TRIAL WILL NOT BE GRANTED ON GROUND THAT VERDICT IS AGAINST EVIDENCE, where the evidence is conflicting. *Templin v. Iowa City*, 455.
  36. ERROR THAT PROOF WAS INSUFFICIENT CANNOT BE COMPLAINED OF, and assigned, where the bill is taken for confessed. *Stephens v. Bicknell*, 242.
  37. PARTY CANNOT REVERSE JUDGMENT ON ERROR, when he has recovered judgment and received the amount of it from defendant. *Watkins v. Martin*, 59.
  38. REFUSAL OF JUDGE TO ALLOW DEPOSITIONS USED ON TRIAL TO BE DELIVERED TO JURY, on their retiring to consider their verdict, is not a legal ground of exception. It is a matter resting in his discretion. *Whithead v. Keyes*, 672.
  39. ALLOWANCE OF DISCONTINUANCE AT TRIAL AS TO ONE DEFENDANT, when it can, upon no fair hypothesis or reasonable intendment, be reconciled with justice, is not a matter within the discretion of the court. *Yanbey v. Richardson*, 769.
  40. BILL OF EXCEPTIONS IS REMEDY OF PARTY AGGRIEVED BY ANY RULING OF COURT ON TRIAL WITHOUT JURY, which would affect conclusions of fact, as upon the admission or rejection of evidence; but when the only error alleged is that the finding of the facts does not support the judgment, no exceptions are necessary, as the finding itself becomes a part of the record, and presents the question as fully as it could be presented by exceptions. *Trudo v. Anderson*, 795.
  41. JUDGE'S FINDING OF FACTS SHOULD STATE CONCLUSIONS OF FACTS, and not merely evidence tending to prove them. *Id.*
  42. AMENDMENT OF ASSIGNMENT OF ERRORS WAS PERMITTED AT HEARING, where the objection to the assignment was purely technical, and it was apparent that the defendant in error could not have been misled as to the question intended to be raised. *Id.*
  43. BREACH OF AGREEMENT TO FORBEAR TO BRING SUIT UPON NOTE FOR REASONABLE TIME cannot be made available by way of counterclaim. *Newkirk v. Neild*, 383.
- See ADVANCEMENTS; CRIMINAL LAW; EQUITY; ESTATES OF DECEDENTS; EVIDENCE; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; INJUNCTIONS; LIBEL; MANDAMUS; MISTAKE; MORTGAGES; PROBATE COURTS; REMOVAL OF CAUSES; REPLEVIN; STATUTE OF LIMITATIONS; TRESPASS; TRUSTS; WILLS.

#### PLEDGE

See CORPORATIONS, 22.

## POWERS.

1. **DEED EXECUTED UNDER POWER OF ATTORNEY IS NOT VALID**, unless there was an intention on the part of the attorney to execute the deed under and by virtue of the power; or at least it should not appear that the contrary intention existed. *Davenport v. Parsons*, 772.
2. **WHERE DEED PURPORTED TO BE MADE BY ATTORNEYS UNDER POWER FROM TWO GRANTORS**, and some evidence was given of the existence of a joint power from them, but only a power from one of them individually was produced: *Held*, that the execution of the deed could not be referred to this separate power, so as to uphold it as the deed of the grantor who had given such power. *Id.*
3. **NON-EXECUTION OF POWER CANNOT BE AIDED BY PROOF OF INTENTION TO EXECUTE IT**. Thus if an attorney in fact, acting under a power of attorney, executed by both husband and wife, sign a deed of conveyance as the attorney of the husband only, the deed will operate to convey only the husband's interest, and will not bar dower of the wife; and the failure to execute the deed as the attorney of the wife cannot be aided by evidence showing a mistake on the part of the attorney in drawing the deed. *Wilkinson v. Getty*, 428.

## PRINCIPAL AND AGENT.

See AGENCY.

## PROBATE COURTS.

1. **APPEAL FROM ORDER OR DECREE OF ORPHANS' COURT MAY BE TAKEN BY ANY PERSON**, in Maryland, on whose interest such order or decree has a tendency to operate injuriously; but such person must show that he has an interest in the subject-matter of the decree or decision appealed from. *Cecil v. Cecil*, 626.
2. **DECISIONS OF ORPHANS' COURTS ARE FINAL, IF NOT APPEALED FROM**, in matters *in rem*, such as the *factum* of a will, where solemn proof has been resorted to; and issues involving the same questions will not be determined a second time. *Id.*

See ESTATES OF DECEDENTS; EXECUTORS AND ADMINISTRATORS; WILLS.

## PROCESS.

1. **ALL VOIDABLE PROCESS CAN BE MADE PERFECT BY PROPER AMENDMENTS**, but void process cannot be. *Durham v. Heaton*, 275.
2. **OFFICER IS NOT BOUND TO CALL FOR AID IN SERVICE OF MESNE PROCESS**, and is not liable for an escape that might have been prevented by his calling for aid, if the party arrested by him rescues himself or is rescued by others. *Whithead v. Keyes*, 672.
3. **OFFICER IS BOUND TO USE ALL REASONABLE AND PROPER EXERTIONS TO SECURE ARREST** of a person for whose arrest he has a writ, and if the jury believe that he has not done so, he may be held liable for an escape, although he used all such exertions as he deemed necessary at the time. *Id.*
4. **OFFICER EFFECTS ARREST OF PERSON WHOM HE HAS AUTHORITY TO ARREST**, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him. *Id.*

See EXECUTIONS, 7.

## PUBLIC LANDS.

**UNITED STATES PATENT, FOLLOWING FINAL DECREE AFFIRMING VALIDITY OF MEXICAN GRANT**, takes effect by relation at the date of the presentation of the petition for confirmation to the land commission, and is to be regarded, so far as all intermediate conveyances are concerned, as having been executed at that time. *Touchard v. Crow*, 108.

## QUANTUM MERUIT.

See **CONTRACTS**, 5.

## QUITCLAIM.

See **DEEDS**, 2.

## RAILROADS

1. **DECLARATION AGAINST RAILROAD COMPANY FOR KILLING STOCK NEED NOT NEGATIVE** the possibility that the stock may have been killed at a properly fenced farm-crossing; in which case, the company would not have been liable under the statute. *Great Western R. R. Co. v. Helm*, 228.
2. **RAILROAD CORPORATION, HAVING AFFIRMATIVE RIGHT OF POSSESSION AND MANAGEMENT OF ITS ROAD UNDER ITS MORTGAGE**, has a legal right to contract for such articles as would enter into the expense of maintaining and operating the road. *Parkhurst v. Northern Cent. R. R. Co.*, 648.
3. **RAILROAD CORPORATION CONVEYS ONLY NET INCOME OF ROAD**, after payment of all expenses, while it remains in no default in paying the interest, and providing a sinking fund, by a mortgage of its entire road, lands, buildings, rolling-stock, machinery, etc., together with all its tolls, income, rents, issues, and profits, and alienable franchises, to secure its entire debt, providing that if the interest or principal of its bonds should not be paid when due, the trustees under the instrument were to take possession, work the road, and apply the net income to the payment of the bonds, interest and principal; but that until default in the payment of the interest or principal, the mortgagors should continue in the management of the mortgaged property. *Id.*
4. **RAILROAD COMPANY IS RESPONSIBLE AS WAREHOUSEMAN ONLY, AND NOT AS COMMON CARRIER**, for goods to which something remains to be done by the consignor or his agents, after their delivery to the company, before they are in a condition for transportation. Where, therefore, an arrangement exists between two railroad companies by which goods which have been carried to the end of one road, and are destined to some point upon or beyond the line of the other, are delivered to the second company with expense bills, upon receipt of which, if correct, way-bills are made out, such second company is, until the delivery of the expense bills, responsible only as warehousemen, and not as common carriers, for goods so received and stored by it. *Judson v. Western R. R. Corporation*, 718.

See **COMMON CARRIERS**; **CORPORATIONS**, 6, 8, 12; **HIGHWAYS**, 4-6; **MORTGAGES**, 19, 20; **NEGLIGENCE**, 5, 6.

## REALTY.

See **VENDOR AND VENDEE**.

## RECORDING.

See **REGISTRATION**.

## REDEMPTIONS.

See EXERCUTIONS, 5; MORTGAGES, 21-23; TRUSTS, 1.

## REGISTRATION.

1. OBJECT OF REGISTRY LAW IS TO PROTECT PURCHASERS IN GOOD FAITH for a valuable consideration against prior secret conveyances. *Columbia Bank v. Jacobs*, 792.
2. INDEX ENTRY OF DEED DESCRIBING LAND CONVEYED AS IN DIFFERENT SECTION, township, and range from those of the deed, and containing the words "for description, see record," is not constructive notice of such deed to subsequent purchaser. *Breed v. Conley*, 485.
3. IN CASE OF CONVEYANCE BY DEED ABSOLUTE, AND WRITTEN DEFEASANCE BACK BY GRANTEE, and the former is recorded, but the latter is not, such unregistered defeasance is not void under the Michigan statute (Comp. Laws, sec. 2751), except as to purchasers for a valuable consideration, without actual notice of its existence. *Columbia Bank v. Jacobs*, 792.

See ACKNOWLEDGMENTS, 2; ATTACHMENT, 7, 8; EQUITY, 2.

## RELEASE.

See DEEDS, 2.

## REMOVAL OF CAUSES

1. STATE COURT CANNOT PREVENT OR OPPOSE REMOVAL OF CASE TO FEDERAL COURT, if it is legally removable thereto. In cases to which the act of Congress applies, the removal is a matter of right, and not within the discretion of the state courts. *Yaukey v. Richardson*, 769.
2. JUDGMENT AGAINST DEFENDANT WAS ENTIRELY REVERSED, it appearing that the proceedings in the action were a manifest fraud, with a view to deprive the defendant of his right to remove the case to the United States court. *Id.*

## REPLEVIN.

1. OWNER OF PROPERTY MAY MAINTAIN REPLEVIN THEREFOR WITHOUT PREVIOUS DEMAND, where the person in charge of the property disposes of it without authority, and notwithstanding the property is in the hands of a *bona fide* purchaser, without notice of the real owner's title. *Trudo v. Anderson*, 795.
2. PLAINTIFF IN REPLEVIN, TO RECOVER, MUST PROVE that he was entitled to the possession of the property in controversy at the commencement of the action. *Alden v. Carver*, 430.

## RIPARIAN RIGHTS.

OWNER OF LAND OVER WHICH NATURAL STREAM FLOWS HAS RIGHT TO REASONABLE USE OF WATER for mills or other purposes, and is not liable for obstructing or using the water for his mill, if his dam is only of such magnitude as is adapted to the size and capacity of the stream and to the quantity of water usually flowing therein, and his manner of using the water is not unusual or unreasonable, according to the general custom of the country in cases of dams upon similar streams. *City of Springfield v. Harris*, 715.

## RIVERS.

See WATERCOURSES.

## SALES.

**PURCHASER OF GOODS FROM FRAUDULENT VENDOR MAY HAVE LEGAL AND BENEFICIAL OWNERSHIP** therein, and may transfer it to a *bona fide* purchaser at any time before the creditors of the fraudulent vendor take steps to divest him of the property. *Sharp v. Jones*, 359.

See AGENCY, 2; CORPORATIONS, 22; ESTATES OF DECEDENTS, 1, 4, 5; EXECUTIONS; EXECUTORS AND ADMINISTRATORS, 2-6; GROWING CROPS; GUARDIAN AND WARD, 7; MORTGAGES; NOTICE; USURY; VENDOR AND VENDEE.

## SEALS.

**WORD "SEAL," EMBRACED IN BRACKETS, AND APPEARING IN COPY OF INSTRUMENT** embodied in record on appeal, imports that the proper seal is affixed to the original, unless objection is taken at the trial on this ground. *Touchard v. Crow*, 108.

## SEWERS.

See CORPORATIONS, 37-41.

## SHERIFFS.

1. **EXECUTION SHOWING THAT JUDGMENT UNDER WHICH IT WAS ISSUED WAS** recovered "before G. S. M.," without stating that he was a justice of the peace, would not be absolutely void in the hands of a constable, so as to enable him to protect himself from liability on his bond for improper or negligent treatment of property seized or levied upon by virtue thereof. *Dean v. Goddard*, 423.
2. **SHERIFF'S RETURN OF RESCUE ON WRIT IS NOT CONCLUSIVE EVIDENCE** IN HIS FAVOR, in an action against him for an escape. *Whithead v. Keyes*, 672.

See EXECUTIONS.

## SLANDER.

1. **THESE WORDS, SPOKEN OF WOMAN, ARE ACTIONABLE PER SE:** "Baden saw or told me that on Sunday, at the camp-meeting, he either scared or drove Jane Owens and a man supposed to be Jo. Dearmond, up from behind a log; he and others supposed it to be Jo. Dearmond; they broke and ran; I [Baden] got her parasol and handkerchief, and if any one don't believe me, they can come and see them." *Proctor v. Owens*, 341.
2. **WORDS CALCULATED TO INDUCE HEARERS TO SUSPECT** that the plaintiff was guilty of adultery, are actionable *per se*. *Id.*
3. **IN ACTION FOR SLANDER, COURT MAY PERMIT PLAINTIFF TO AMEND** his complaint, after the trial has been entered upon, by inserting additional words, or by correcting those already in the complaint, but not by inserting an entirely new set of words essentially different from those previously alleged. *Id.*

See LIBEL; STATUTE OF LIMITATIONS, 7.

## SOVEREIGNTY.

1. **QUASI CORPORATION IS NOT LIABLE FOR ACTS OF OFFICERS OR EMPLOYEES WHICH IT APPOINTS**, in the exercise of a portion of the sovereign

power of the state by requirement of a public law, solely for the public benefit, and for a purpose from which such corporation derives no benefit. *Sherbourne v. Yuba County*, 151.

2. COUNTY INCURS NO LIABILITY FOR DAMAGES TO INMATE OF COUNTY HOSPITAL, who sustains injuries from unskillful treatment by the resident physician, or from the failure on the part of the officers of the hospital to supply sufficient and wholesome food. *Id.*

See CORPORATIONS, 5, 6.

### STATUTES.

1. EFFECT OF REPEALING STATUTE — OBLIGATION — REMEDY. — Contract of specialty was entered into, and judgment rendered, under a statute declaring that no writ of *capias ad satisfaciendum* should in any case be issued upon a judgment recovered by a party not at the time a resident of the state, without an affidavit of fraud against defendant. Subsequently a statute was passed repealing the above requirement, and containing no saving clause as to pending suits. After this a writ of *capias ad satisfaciendum* issued on the judgment without such affidavit of fraud. *Held*, that the repealing statute did not impair the obligation as to bail, but merely modified the remedy. *Cook v. Gray*, 185.
2. LEGISLATURE, WHILE IT CANNOT IMPAIR OBLIGATION, may, at pleasure, regulate the remedy, both as to past and future contracts. *Id.*
3. RULE THAT IN ABSENCE OF EXPRESS EVIDENCE of legislative intent that a law should operate retrospectively, the court will not so construe it, has no application to a repealing statute not affecting vested rights, merely operating on the remedy, and containing no saving clause as to pending suits. Such statute will have a retroactive operation. *Id.*
4. IN CONSTRUING STATUTE, "MAY" WILL BE CONSTRUED TO BE SYNONYMOUS WITH "SHALL," where the public or third persons have a claim *de jure* that the power should be exercised, but where this is not the case, "may" will not be construed as "shall." *Bansmer v. Mace*, 344.
5. STATUTE RELATING TO SUBJECT-MATTER OF ORDER MADE PREVIOUS TO ITS PASSAGE will not affect the decision of the appellate court on appeal from the order. *State v. McGlynn*, 118.

See BUILDING AND LOAN SOCIETIES; CONSTITUTIONAL LAW.

### STATUTE OF LIMITATIONS.

1. IN ALLOWING DEFENSE OF STATUTE OF LIMITATIONS, courts of equity generally follow the law. A bar of the statute, at law, forms a bar in equity. *Harris v. Mills*, 259.
2. ACKNOWLEDGMENT SUFFICIENT TO REMOVE BAR OF STATUTE OF LIMITATIONS, at law, will be sufficient in equity. *Id.*
3. DEBT IS PRINCIPAL THING, and the mortgage given to secure it is the incident. The latter follows the former. *Id.*
4. WHEN STATUTE OF LIMITATIONS BARS RECOVERY ON NOTE, the right to foreclose a mortgage given to secure the note is also barred; unless the mortgage contains a covenant for the payment of the money, when it might be that it would require the period fixed for the limitation in such cases to bar the right to foreclose. *Id.*
5. QUESTION WHETHER OR NOT STATE IS AFFECTED BY LIMITATION OF ONE YEAR within which probate may be contested need not be decided in a



proceeding commenced by the state in a district court for the purpose of setting aside the probate of a will, since the only effect of exempting the state from the limitation would be to authorize the state to institute such proceedings in the probate court, not to confer jurisdiction on the district court. *State v. McGlynn*, 118.

6. **STATUTE OF LIMITATIONS RUNS ON CERTIFICATE OF DEPOSIT ONLY FROM TIME OF DEMAND ACTUALLY MADE**, where it is payable on demand, with interest, on the return of the certificate. *Fells Point Savings Institution v. Weedon*, 603.
7. **ON PLEA OF STATUTE OF LIMITATIONS, IN ACTIONS FOR SLANDER, BURDEN IS ON PLAINTIFF** to show that the cause of action accrued within the statutory period, prior to commencement of the action. *Pond v. Gibson*, 724.

See **VENDOR AND VENDER**, 9.

### STREETS.

See **EMINENT DOMAIN; HIGHWAYS**.

### SUBSCRIPTIONS.

See **CORPORATIONS**, 18-21.

### SUNDAY.

See **ARBITRATION AND AWARD**.

### SURETYSHIP.

See **BONDS**.

### TAXATION.

1. **TAX DEEDS, WHEN REGULARLY EXECUTED, ARE PRIMA FACIE EVIDENCE** of the regularity of all prior proceedings in the levy of the tax, and the sale of the property, under the Iowa revenue law of 1841; and when such deeds are attacked, the burden of showing failure to comply with the requirements of the law in such proceedings is upon the party making such attack. When, however, no record of the tax levy or sale exists, the burden of proof is on the party claiming under the deed. *Long v. Burnett*, 420.
2. **FAILURE TO RECITE IN TAX DEED ONE OF REQUISITES TO VALID LEVY OF TAX**, where all the other essential requisites are set out, is evidenced by implication that the requirement not recited was not complied with. *Id.*

### TELEGRAPHS.

1. **TELEGRAPH COMPANY IS RESPONSIBLE FOR ANY LOSS OR INJURY** which results from its failure or neglect to transmit a message received by it for transmission. *Birney v. Printing Telegraph Co.*, 610.
2. **TELEGRAPH COMPANY IS NOT COMMON CARRIER**, but a bailee, performing, through its agents, a work for its employer, according to certain rules and regulations, which, under the law, it has a right to make for its government. *Id.*
3. **ONE WHO SENDS MESSAGES BY TELEGRAPH IS SUPPOSED TO KNOW** that the company's engagements are controlled by those rules and regulations which it has a right to make, and in law, he ingrafts them in his contract, and is bound by them. *Id.*

4. **EXEMPTION FROM LIABILITY FOR NON-TRANSMISSION AND NON-DELIVERY OF UNREPEATED MESSAGES DOES NOT APPLY** to a case where no effort was made by the company, or its agents, to put the message on its transit. *Id.*

## TENDER.

**TENDER OF SPECIFIC ARTICLE MUST BE OF SUCH ARTICLE**, in every material respect, as the contract under which it is made requires. *Sharp v. Jones*, 359.

## TORTS.

1. **FALSE STATEMENTS FURNISH NO CAUSE OF ACTION**, if they relate to matters concerning which the person to whom they are made, by the use of ordinary care and attention, can obtain full and accurate information. And therefore the owner of land who has directed his agent to erect a house at a particular place on it cannot maintain an action against a third person who by false representations as to the true boundary line of the land has induced such agent, in the owner's absence, to erect the house at a different place. *Silver v. Frazier*, 662.
2. **WHERE LOSS OR INJURY COMPLAINED OF IS NOT DIRECT AND IMMEDIATE RESULT** of the defendant's wrongful act, no action can be maintained. *Id.*

See **ILLEGAL IMPRISONMENT**.

## TREATIES.

1. **TREATY IS PARAMOUNT TO STATE LAW**, and the latter must yield to the extent of its conflict with the treaty, but it is void only so far as it contravenes the constitution, laws, or treaties of the federal government. *Yeaker v. Yeaker*, 530.
2. **TREATIES, AS TO GOVERNMENT MAKING THEM** take effect not merely from the day of ratification, but from the date of their execution, unless they contain stipulations to the contrary. But where they affect individual rights, the ratification of the treaty must be deemed its date. *Id.*

See **ALIENS**, 1.

## TRESPASS.

1. **ACTION OF TRESPASS WILL LIE AGAINST STEAMBOAT, UNDER ILLINOIS STATUTE**, for an assault and battery committed by the mate or other officer of the boat, on the person of a passenger on board, while such boat is navigating the rivers within or bordering upon the state. *Loy v. Steamboat F. X. Aubury*, 292.
2. **EXEMPLARY DAMAGES MAY BE AWARDED IN TRESPASS FOR ENTERING PLAINTIFF'S PREMISES**, and willfully damaging his goods, notwithstanding the defendant made the entry in good faith under the belief that he had a right to enter. A willful injury to goods is as much a ground for exemplary damages as a willful entry. *Best v. Allen*, 338.
3. **LIABILITY IS THAT OF JOINT TRESPASSERS** where several different creditors acting separately, without concert, and even without knowledge that they are employing a common agent, cause their debtor to be arrested on their several writs, by the same officer, who serves the writs simultaneously, and by virtue thereof, the debtor is committed to jail, where he is confined upon all of such writs at the same time; and full satisfaction

by the debtor, obtained from any one of such person, is a bar to an action by him against the others. *Stone v. Dickinson*, 727.

See ANIMALS, 4; CO-TENANCY, 2-4; NUISANCE, 2.

### TRUSTS.

1. DEED CONVEYING ABSOLUTE TITLE TO TRUSTEES ON DECLARED TRUST will not be construed as a mortgage, and there will be no equity of redemption from a sale thereunder. *Gillespie v. Smith*, 328.
2. SALE OF LAND UNDER TRUST DEED WILL NOT BE SET ASIDE IN EQUITY, because the property was not sold in separate parcels, except upon the ground of fraud, or that some one may have been prejudiced by the sale *en masse*. *Id.*
3. TRUSTEE UNDER TRUST DEED MAY EMPLOY AGENT TO PERFORM MECHANICAL PARTS of sale, or to act as auctioneer, or to advertise and sell the trust lands. This is not a delegation of the trust. *Id.*
4. WHERE TRUSTEE WHO HOLDS BOTH LEGAL AND EQUITABLE TITLE TO REAL ESTATE in trust for partners in a land speculation whose rights are accordingly personal, by the direction and with the consent of the *cestuis que trust* conveys the land to another without specifying the nature of the trust, such conveyance raises a simple trust, and the right of the *cestuis que trust* becomes thereby changed from personalty to an equitable estate of inheritance in which the widow of one of the *cestuis que trust* is dowerable. *Nicoll v. Ogden*, 311.
5. DECLARATIONS OF TRUST DEFINING NATURE OF TRUST EXECUTED BY TRUSTEE AND CESTUIS QUE TRUST after the execution of the trust deed and changing the character of the trust thereby constituted, cannot have a retroactive effect so as to divest an inchoate right of dower which attached to the subject-matter of the trust upon the execution of the trust deed. *Id.*
6. TRUSTEES CANNOT BY DECLARATION OF TRUST RELIEVE THEMSELVES OF ANY DUTIES THEREOF, though they may voluntarily assume new duties. *Id.*
7. EXECUTORY TRUST IS ONE WHERE BENEFICIARY IS NOT YET CLOTHED WITH EQUITABLE TITLE, but has a mere right to have some act done, which will vest in him such equitable title. *Id.*
8. EXECUTORY TRUST IS CONSTITUTED AND CESTUIS QUE TRUST HAVE NO EQUITABLE TITLE TO LAND where by a declaration of trust executed by them they provide that the trustee shall not convey it to them until after partition, and then in severalty, or that he shall sell it and divide the proceeds among them; and dower cannot attach to property thus held. *Id.*
9. RIGHT OF PARTNER IN LAND SPECULATION, WHERE LAND IS HELD IN TRUST by one of the partners, is a personal right, and will not descend to his heirs. *Id.*
10. SECTION 33 OF KENTUCKY CODE, ENABLING TRUSTEES to bring actions in their own names without joining the beneficiaries, has not changed the rule under the old practice providing that a trustee under a mortgage made to secure the payment of money to others could not sue for a foreclosure and sale without making the *cestuis que trust* parties. *Bardstown etc. R. R. Co. v. Metcalfe*, 541.
11. TRUSTEE, TO MAINTAIN ACTION IN HIS OWN NAME, without joining the *cestuis que trust*, under section 37, code of Kentucky, must allege or show

that the beneficiaries are numerous, and that it is impracticable to bring them before the court within a reasonable time. *Id.*

12. WHEN TRUSTEE IS ENTITLED TO SUE IN HIS OWN NAME without joining the beneficiaries, it is error to give him judgment for the money. The court should retain control over it for the benefit of those entitled to it. *Id.*

See HOMESTEADS, 2.

## UNDERTAKINGS.

See BONDS.

## UNDUE INFLUENCE.

See NEGOTIABLE INSTRUMENTS, 11.

## UNLAWFUL IMPRISONMENT.

See FALSE IMPRISONMENT.

## USURY.

1. DEDUCTION FOR UNLAWFUL INTEREST ACTUALLY PAID WILL NOT BE ALLOWED, in favor of debtor, when suit is brought on a new security taken for the principal, and given upon a *bona fide* settlement of all the former transactions between the parties. *Smith v. Stoddard*, 778.
2. NEW SECURITY, INCLUDING SUM FOR UNLAWFUL UNPAID INTEREST, is so far without consideration, and liable to abatement to that extent. *Id.*
3. PLAINTIFF MAY RECOVER INTEREST ON USURIOUS CONTRACT UP TO HIGHEST LEGAL RATE not prohibited by the statute, if such be the express terms of the contract. *Id.*
4. SALE, BY AGENT EMPLOYED THEREFOR, FOR LESS THAN ITS FACE, OF PRINCIPAL'S NOTE, payable to his own order and indorsed by him, is usurious, although the purchaser supposes that he is merely purchasing the note in the market, and does not know that the seller is acting only as an agent. *Sylvester v. Swan*, 734.
5. DECREE OF FORECLOSURE OF NOTE AND MORTGAGE BEARING TEN PER CENT INTEREST, where the legal rate is but six, must be for the principal and six per cent only, and interest paid over six per cent must be credited. *Herring v. Woodhull*, 296.
6. MORTGAGOR CANNOT MAINTAIN ACTION TO RECOVER USURIOUS INTEREST, collected by sale of mortgaged premises under power of sale contained in mortgage deed; and the fact that the execution of the power was against the wishes of the debtor at the time does not aid him. *Pertine v. Conant*, 305.
7. VENDEE WHO PURCHASES SUBJECT TO MORTGAGE TAINTED WITH USURY cannot avail himself of the defense of usury against a bill for foreclosure. *Stein v. Indianapolis Building etc. Association*, 353.
8. DEFENSE OF USURY IS PERSONAL TO BORROWER and his heirs and representatives. *Id.*

## VENDOR AND VENDEE.

1. STIPULATIONS IN AGREEMENT FOR SALE OF LAND MUST BE CONSIDERED AS DISCHARGED BY EXECUTION OF CONTRACT by the acceptance of a deed of conveyance of the land, and the giving of bonds and mortgage to secure the purchase-money, there being no fraud, mistake, or surprise charged or proved in the transaction. *Twiss v. Shannon*, 632.

2. GRANTER WHO ACCEPTS DEED WITH SPECIAL WARRANTY, AND EXECUTES BONDS AND MORTGAGE FOR PURCHASE-MONEY, CANNOT CLAIM DEDUCTION or abatement from the mortgage debt by reason of an outstanding encumbrance on the land within the warranty, in a suit brought by an assignee to foreclose the mortgage. *Id.*
3. TO AVOID CONTRACT FOR PURCHASE OF LAND ON GROUND OF FRAUD IN VENDOR, vendee must repudiate contract and demand its rescission immediately upon discovering the fraud; and if, after such discovery, he remains quietly in possession for a long time, he cannot afterwards avoid the contract. *Blen v. Water and Mining Co.*, 132.
4. LAW DOES NOT PRONOUNCE, AS EXPRESSIONS OF OPINION, representations made by a vendor as to the boundaries of land, or as to the qualities of machinery situate thereon. They may be either expressions of opinion or of fact, and it is for the jury to decide whether they are one or the other. *Foster v. Kennedy*, 56.
5. MEASURE OF DAMAGES FOR FALSE REPRESENTATIONS concerning the boundary lines to land, as to the location of a certain mill-pond and mill, is the diminution of the value of the property in consequence of the mill and pond not being on the land on which it was represented to be. The inquiry is limited to the injury resulting from the false representations. *Id.*
6. IN ACTION TO RECOVER DAMAGES FOR FALSE REPRESENTATIONS concerning the boundary lines to land, as to the location of a mill-pond and mill, a witness is not allowed to make comparisons between the actual value of the property and the value upon the supposition of the pond being upon one tract of land, when the false representations alleged in the complaint are that it is upon another tract. *Id.*
7. VENDOR'S LIEN IS NOT ASSIGNABLE. *Richards v. Leaming*, 239.
8. SIMPLE ASSIGNMENT OF NOTE GIVEN FOR PURCHASE-MONEY OF LAND does not carry with it the vendor's lien so that the assignee can enforce it in his own name. *Id.*
9. VENDOR'S LIEN IS WAIVED by the taking of any security, either personal or material; or by the neglect to enforce the lien for a considerable time, though short of the time prescribed by the statute of limitations. *Id.*
10. VENDOR'S LIEN, AFTER ABSOLUTE CONVEYANCE, IS NOT SPECIFIC, ABSOLUTE CHARGE UPON PROPERTY, but only an equitable right of the vendor to resort to it in case the purchase-money is not paid. *Baum v. Grigsby*, 153.
11. EQUITABLE LIEN WHICH VENDOR OF LAND RETAINS, AFTER ABSOLUTE CONVEYANCE, for the unpaid purchase-money, is not assignable. *Id.*
12. VENDOR'S LIEN FOR PURCHASE-MONEY OF LAND IS NOT WAIVED, in absence of express agreement to that effect, by the fact that he takes the note or other personal security of the vendee for the money; but is waived by the taking of a distinct and independent security, unless there is at the time an express agreement for its retention. *Id.*
13. DISTINCTION BETWEEN LIEN OF VENDOR AFTER ABSOLUTE CONVEYANCE, and lien of vendor when contract of sale is unexecuted, stated. *Id.*
14. ACTUAL EVICTION IS NECESSARY TO CONSTITUTE DEFENSE TO ACTION FOR PURCHASE PRICE OF LAND, on the ground of failure of consideration from a defect in title, where a deed has been given, and the purchaser has entered into possession; although an eviction is not necessary where there has been no conveyance. The grantee, who is not evicted, but remains in undisturbed possession, must rely on his covenants, except in case of fraud. *Timms v. Shannon*, 632.

## WAGERS.

1. **WAGER THAT RAILROAD WILL NOT BE COMPLETED WITHIN GIVEN TIME** IS VALID at common law, and not prohibited by the laws of Illinois as having an immoral, indecent, or illegal tendency. *Beadles v. Bless*, 231.
2. **EVIDENCE THAT WAGER WAS PUBLIC TALK AND INFLUENCED SUBSCRIPTION** to railroad stock is not admissible in an action on a wager that a railroad will be completed within a certain time. *Id.*

## WAREHOUSEMEN.

**WAREHOUSEMAN WITH WHOM COMMON CARRIER STORES GOODS** may retain possession of the same, when, so instructed by the carrier, until "back charges" thereon are paid. *Alden v. Carver*, 430.

See RAILROADS, 4.

## WATERCOURSES.

1. **RIVER IS PUBLIC HIGHWAY BY LAW OF MAINE, THOUGH NOT NAVIGABLE STREAM**, if it is of sufficient capacity to float logs, rafts, etc. *Gerrish v. Brown*, 569.
2. **PERSON WHO OBSTRUCTS STREAM WHICH IS BY LAW PUBLIC HIGHWAY**, by casting therein waste material, filth, or trash, or by depositing material of any description, except as connected with the reasonable use of such stream as a highway, or by direct authority of law, does so at his own peril. It is a public nuisance, for which he would be liable to an indictment and to an action at law by any individual who should be specially damaged thereby. *Id.*
3. **MILL-OWNER WHO CASTS SLABS, EDGINGS, OR OTHER WASTE OF HIS MILL INTO RIVER** to be floated away by the stream, whereby navigation is obstructed, or the rights of private individuals infringed, is liable to an action for damages by a person specially damaged. *Id.*
4. **TEMPORARY OBSTRUCTION OF PORTION OF STREAM AS INCIDENT TO RIGHT OF NAVIGATION**, while preparing materials for transportation or securing them at the termination of their transit, is no violation of law. In this respect public streams are governed by the same general rules of law as are highways upon land. *Id.*
5. **TEMPORARY SHEER OR GUIDE BOOMS, THOUGH OBSTRUCTIONS TO NAVIGATION, MAY BE USED**, as incident to the reasonable use of a river for running and securing logs, for the purpose of directing the logs or lumber into proper places in which to detain them for use; but the stream may not be permanently obstructed and converted into permanent places of deposit for logs by the construction of piers and booms. *Id.*
6. **EVERY PERSON HAS EQUAL RIGHT TO REASONABLE USE OF NAVIGABLE RIVERS** or public streams as public highways. *Davis v. Winslow*, 573.
7. **WHAT CONSTITUTES REASONABLE USE OF NAVIGABLE STREAM AS HIGHWAY** depends upon circumstances of each particular case; and no positive rule of law can be laid down to define and regulate such use with entire precision; but regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, necessity, and duration, and the established usage of the country. The size of the stream, also, the fall of water, its volume, velocity, and prospective rise or fall, are to be considered. *Id.*
8. **ONE WHO IS USING STREAM AS HIGHWAY, and in the exercise of ordinary care necessarily and unavoidably impedes or obstructs another tem-**

porarily, does not thereby become a wrong-doer, his acts are not illegal, and he creates no nuisance for which an action can be maintained. *Id.*

2. QUESTION OF REASONABLE USE OF RIVER AS HIGHWAY by defendant having been, by the consent of both parties, submitted to the jury in an action for damages accruing from an obstruction of the river by a boom, whereby plaintiff's logs were detained, this was a waiver by the parties of their right to except to the instructions of the court upon the subject. *Id.*

#### WATERS.

See RIPARIAN RIGHTS.

#### WILLS.

1. TESTATOR IN NUNCUPATIVE WILL MUST REQUEST THOSE PRESENT, BY SIGNS OR WORDS, TO BEAR WITNESS that such is his will, in order to render it valid under the Illinois statutes. *Arnett v. Arnett*, 227.
  2. DECREE OF PROBATE COURT ADMITTING WILL TO PROBATE IS FINAL AND CONCLUSIVE as to validity thereof, if not reversed by the appellate court, and is not liable to be vacated or questioned by any other court, either incidentally or by any direct proceeding for the purpose of impeaching it. *State v. McGlynn*, 118.
  3. WILL ADMITTED TO PROBATE MUST BE RECOGNIZED AND ADMITTED in all courts to be valid so long as the probate stands. *Id.*
  4. COURTS OF CHANCERY IN ENGLAND HAVE NO POWER TO DETERMINE VALIDITY OF WILL of either real or personal property. Their comprehensive jurisdiction to set aside other fraudulent instruments does not extend to wills obtained by fraud. *Id.*
  5. ENGLISH COURTS OF CHANCERY HAVE DEPRIVED PARTIES OF BENEFIT OF FRAUDULENT WILL in some cases, by decreeing that such parties shall hold the property under the will in trust for the parties who would have been entitled to it if such will had not been probated; but they have in all such cases disclaimed any power to set aside the will or the probate. *Id.*
  6. PRINCIPLES ESTABLISHED IN ENGLAND APPLY TO AND GOVERN CASES arising under probate law of this country. *Id.*
  7. DECREE ADMITTING WILL TO PROBATE CANNOT BE REVIEWED OR SET ASIDE BY COURT OF CHANCERY on the ground that the will was obtained by fraud, or on any other ground. *Id.*
  8. REASON THAT DECREE ADMITTING WILL TO PROBATE IS CONCLUSIVE AS TO VALIDITY OF WILL upon all persons and all courts is, that the probating of a will is not a proceeding to decide a contest between parties, but a proceeding *in rem*, to determine the character and validity of an instrument affecting the title to property, and which it is necessary for the repose of society should be definitely settled by one judgment. *Id.*
  9. DANGER OF HOLDING DECREE ADMITTING WILL TO PROBATE FINAL AND CONCLUSIVE is obviated by the right of appeal to the supreme court and the statutory provisions permitting the contest of the decree or of the validity of the will at any time within one year, and securing the rights of persons under disabilities. *Id.*
- See DOWER; ESTATES OF DECEDENTS; GUARDIAN AND WARD, 4, 5, 12; INJUNCTIONS, 2; STATUTE OF LIMITATIONS, 5.



## WITNESSES.

1. **PRESIDENT OF CORPORATION OWNING STOCK THEREIN IS INCOMPETENT**, on the ground of interest, to testify concerning his acts as agent of the corporation. The exception to the general rule, so far as the members of a corporation are concerned, seems to be confined to keepers and depositaries of corporate documents. *Blen v. Water and Mining Co.*, 132.
  2. **FOR PURPOSE OF IMPEACHMENT**, witness will not be allowed to state in general terms that he had been intimately acquainted with the party for a number of years, and had never heard him utter a declaration proved by another witness. *Lawson v. Hicks*, 49.
  3. **WITNESS INTERROGATED AS TO POSSESSION OF PROPERTY ALLEGED TO HAVE BEEN WRONGFULLY TAKEN**, with a view to show *prima facie* ownership, may be asked on cross-examination whether he knew who owned the property; but the refusal of the court to allow the question is not ground for refusal, where the court offered to permit a recall of the witness by the defendant, as the adoption of this course is a matter within the sound discretion of the court. *Davis v. Simma*, 462.
- See ATTORNEY AND CLIENT, 2; EVIDENCE, 7, 12; JURY AND JURORS; WILL, 1.

## WRITS.

See MANDAMUS.

## WRITS OF ASSISTANCE

See MORTGAGES, 25, 26.

## WRITS OF INQUIRY.

See DAMAGES, 2.



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